Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

SHIRLEY A. GRAHAM,

Petitioner,

v.

HARTFORD LIFE & ACCIDENT INSURANCE COMPANY

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the subject plan a government plan and, thus, not subject to ERISA jurisdiction?

2. Can a legal action be brought under 29 U.S.C. § 1132(a)(1)(B) where the parties have a constitutional guaranteed right to trial by jury under the Seventh Amendment?

3. Did the trial court and the Tenth Circuit apply special rules of evidence prohibited under this Court's pronouncement in *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 171 L.Ed. 2d 299 (2008)?

PARTIES

The Petitioner is Shirley A. Graham ("Graham").

The Respondent is Hartford Life & Accident Insurance Company ("Hartford")

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PETITION FOR A WRIT OF CERTIORARI

Graham respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals, Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is found at 589 F.3d 1345 and reprinted in the Appendix ("App.") at Page 1a. The opinions of the lower Court are found at 2008 WL 4826314 and 2009 WL 702813 and reprinted in the Appendix at Pages 37a and 45a.

JURISDICTION

The United States Court of Appeal's Order and Judgment was filed on December 29, 2009. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII; 29 U.S.C. § 1002(32); 29 U.S.C. § 1032(a)(1)(B); 29 U.S.C. § 1032(a)(3)

STATEMENT OF THE CASE

A. INTRODUCTION

This is a lawsuit where the plaintiff is a beneficiary under a group disability policy that was issued to the National Rural Letter Carriers Association ("NRLCA"), the bargaining union for the rural letter carriers with the United States Post Service ("USPS"). The NRLCA is made up exclusively of active, full-time rural letter carriers and under the terms of the insurance contract or plan, all premiums for this group policy are paid out of the government allotment of the rural letter carriers directly by the USPS. The plan in question is not the result of a collective bargaining agreement nor does the USPS contribute any premiums. The question is simply this. Is a plan that is established by an employee organization made up exclusively of government employees and funded exclusively by government employees' government allotment or wages a government plan and not subject to ERISA?

For the petitioner this is an important question to be resolved because not only is she entitled to additional damages if she can bring a state court cause of action, but she has the right to confront the witnesses against her, present evidence herself and have many other due process procedural rights that are denied ERISA litigants. This is a case

of first impression where no Court has ruled on such a fact situation.

The second issue is simple. Plaintiff paid this defendant a premium and in return this defendant promised to pay a certain sum of money based on her wage should she become disabled. This Court has described such an action as quintessentially a legal action and has stated that there appears to be no restriction under 29 U.S.C. § 1132(a)(1)(B) to only equitable actions. This Court has never addressed whether a beneficiary or a participant can bring a legal action under 29 U.S.C. § 1132(a)(1)(B). In the case of *Great-West Life & Annuity Insurance Company v. Knudson*, 122 S.Ct. 708 (2002), this Court noted there is no restriction on what type of action can be brought under this section inferring that a legal action can be brought. In that same case, the Court described another action for a claim due and owing under a contract as quintessentially an action at law. If this is indeed an action at law that can be brought under this section, then, undoubtedly, the petitioner or anyone else has a constitutional right to trial by jury.

Petitioner recognizes that Writs for Certiorari are rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. However, we feel that as a general proposition, the trial court and circuit

courts have so far departed from acceptable and usual courses of judicial proceeding in the review of ERISA benefit denials that this Court's intervention is necessary because courts below continue to use special rules of evidence prohibited by this Court's pronouncements resulting in a one sided view of the administrative record with a more than favorable view of the evidence in support of the denial and a jaundiced critical review of the evidence in opposition to a denial where the courts do not fairly weight the evidence. The result of this is that there is no meaningful judicial review of denial of benefits.

B. FACTUAL BACKGROUND

The factual basis in this case are divided into two areas. One is the establishment of the plan and goes to the issue of whether this plan is a government plan, and, thus, not subject to ERISA. The second regards the third proposition before this Court and deals with the administrative record. The Tenth Circuit Opinion makes adequate reference to the pertinent parts of the administrative record with the exception of the opinion of Dr. J.D. McKenzie, M.D. We have set this out in its total, exactly how it was done in our original abstract of record in the Brief in Chief for the Tenth Circuit. First, to demonstrate that this was before the Tenth Circuit in our Opening Brief, and, secondly, because this detailed review of the medical

records gives an excellent shorthand history of petitioner's medical.

1. The Plan

FACTS RELEVANT TO THE ISSUE OF WHETHER THE PLAN WAS A GOVERNMENTAL PLAN

1. The schedule of insurance shows the policyholder as being the National Rural Letter Carriers' Association. It shows the employer as being the United States Postal Service. It shows the eligible class as being all active full-time regular rural letter carriers members.

2. The Certificate of Insurance shows that the insurance was issued by The Hartford to the National Rural Letter Carriers' Association.

3. Attached as Exhibit 3 is the agreement between the United States Postal Service and the National Rural Letter Carriers' Association for the Years 2000 through 2004.

4. On Page 1, it provides as follows:

> The Employer recognizes the Union as the exclusive bargaining representative of all employees in the bargaining unit for which the Union has been recognized and certified at the national level."

It goes on to exclude from employment certain individuals such as management and supervisory personnel, professional employees, security guards, postal inspection service employees, temporary relief carriers, and other bargain unit craft employees. It also excludes from the agreement employees who work in other employer facilities which are not engaged in customer services and mail processing.

5. We see from the agreement that the employer, the USPS, has the exclusive right. subject to the provisions of this agreement and applicable law and regulation, to direct employees in the performance of their duties, to hire, promote, transfer and do all of the things that a boss or employer simply can do. in other words, the United States Postal Service, an arm of the United States Government , employs these people and has the rights and duties of an employer.

6. We see from this agreement that employees are eligible for the Federal Employees Health Benefit Program (FEHBP) just as other federal employees are.

7. We also see that the employees are eligible for retirement under the provisions of Chapter 83 of Title 5 of the U. S. Code and any amendments thereof.

8. The enrollment form shows that the request for coverage is under the Rural Letter Carriers Long Term Disability Plan (RLCLTD) through the National Rural Letter Carriers' Association Group Insurance Contract and that it authorizes the United States Postal Service to make the appropriate deductions from the insured's wages and further authorizes the United States Postal Service to release any information (including salary information) as necessary for the enrollment and/or administration of the Plan benefits to The Hartford Life and Accident Insurance Company.

9. The booklet-certificate again shows that the Schedule of Insurance shows the employer to be the United States Postal Service and the eligible class to be all active, full-time regular rural letter carriers (Designation 71) members.

10. Shirley Graham was employed by the USPS as a rural letter carrier. As a USPS employee, she was a member of the National Rural Letter Carriers' Association (NRLCA). Attached to Shirley Graham's Answer Brief on the Issue of Application of ERISA , 29 U.S.C. § 1001, et seq., was the membership page of NRLCA's website. It shows, "To join the NRLCA, you must first be employed by the USPS and work in the rural carrier craft as a regular, substantive RCR or RCA. This excludes TRC's, who are only temporary relief carriers."

11. From Exhibit 3 of Defendant's Brief, we are told, "NRLCA holds exclusive recognition to represent the rural carrier craft with the United States Postal Service (USPS). " The exhibit goes on to state, "NRLCA negotiates all labor agreements for the rural carrier craft with the USPS, including salaries." Finally, the document states NRLCA can "represent members of the rural carrier craft in the grievance procedure, including provided protection in disciplinary actions."

2. THE ADMINISTRATIVE RECORD EXCERPT

1. Dr. McKenzie.

A. Dr. McKenzie saw Shirley Graham on January 7, 2003;

B. In addition to talking directly to Shirley Graham, he reviewed medical records from Jerry D. McKenzie, M.D., Bruce Shivers, M.D., T. Jeffrey Emel, M.D., Bradford L. Boone, M.D., Keith L. Stanley, M.D. Richard M. Stamile, M.D., Michael D. Farrar, D.O., SIR Magnetic Imaging, Eastern Oklahoma Orthopedic Center, Southcrest Hospital and he reviewed letters from the U.S. Department of Labor, dated 11-06-02 and 12-11-02.

C. At the time she was a 53 year old female who was employed by the US Department of Labor as a rural mail carrier for the Broken Arrow Post

Office for approximately twenty years. That she had not worked since July 15, 2000.

D. On February 7, 1994, during the course of employment she was walking on a sidewalk when a small dog moved aggressively toward her, she stepped back off the sidewalk and twisted her right knee. She immediately felt pain and swelling in her right knee joint and subsequently presented to Eastern Oklahoma Orthopedic Center on the following day, February 8, 1994.

E. She was evaluated by Dr. Keith Stanley and x-rays showed no significant osseous pathology and she was diagnosed with a hamstring and gastrocnemius sprain and a possible intra-articular injury to her right knee. Conservative treatment was recommended through May 5, 1994, when Dr. Stanley later diagnosed intra-articular pathology and recommended surgery.

F. Dr. Bradford Boone, another orthopedic specialist, concurred with Dr. Stanley's assessment.

G. Approval was eventually obtained for a surgery and on July 7, 1994, she was taken to surgery by Dr. Bruce Stivers, another orthopedic specialist and underwent arthroscopic debridement of synovial hypertrophic tissue and a cyclops lesion of the anterior cruciate ligament.

Post surgery she enjoyed some improvement through physical rehabilitation.

H. She returned to limited employment in Mid-July 1995 and full employment in September 1995.

I. When she returned to work, she developed increasing pain in her right knee and because of an antalgic limp, she developed pain in her left knee and left foot.

J. On November 8, 1995, she presented to Dr. Jeffrey Emel and was diagnosed with pés anserine bursitis in her left foot that was injected with a cortisone preparation. Dr. Emel also recommended a weight reduction program to relieve stress off her knees and feet. She underwent a subsequent MRI evaluation of her right knee which was questionable for a cyclops lesion on the cruciate ligament.

K. On December 5, 1996, Dr. Emel diagnosed an interarticular effusion of the right knee, a possible recurrence of the cyclops lesion, and a marked degenerative posterior horn with a lateral meniscus tear which was confirmed by an MRI of the right knee joint. He then recommended arthroscopic intervention which occurred on March 3, 1997. She then underwent a right knee arthroscopic shaving, and chondroplasty of the medial femoral condyle. She underwent physical

therapy post-operatively and was released to light duty on March 17, 1997 and to full duty on April 18, 1997, with permanent lifting restrictions.

L. Dr. McKenzie saw her on October 8, 1997, and recommended an impairment rating.

M. After that evaluation, she underwent a change of conditions for the worse in the Fall of 1998. At that time she states her right knee pain intensified and a short time later, her left knee pain intensified as well. She became weaker in both knees which resulted in several falls. Mrs. Graham suffered a fracture of her right foot and an injury to the left foot which required surgery and the post-operative casting for approximately six weeks.

N. She was seen by Dr. Dunitz for a second opinion and was started on Synvisc injections into her knees in 1998 or early 1999. She returned to Dr. Emel in 1999, and was retreated with Synvisc injections.

O. Subsequent to 1998, she developed significant osteoarthritis involving both knees and both ankles.

P. On May 16, 2002, Mrs. Graham was referred to and evaluated by Dr. Bradford Boone, another orthopedic specialist, for complaints of continued medial compartment knee pain. X-rays

demonstrated joint space loss, and an MRI indicated a torn meniscus. She then underwent an arthroscopic partial medial meniscectomy by Dr. Boone, and was released on June 5, 2002. She remained symptomatic.

Q. She complains of chronic, moderately severe pain in both knees, right worse than left, loss of range of motion in her knees, and weakness in both knees, right worse than left. She has difficulty negotiating steps or inclines, and states she cannot squat. Walking is limited to about ½ block, standing is limited to about 15 minutes and sitting is limited to about 30 minutes. She has fallen on numerous occasions, further injuring her knees and her ankles and her feet.

R. The doctor then performed his own clinical evaluation.

S. He opines that Mrs. Graham has been temporarily totally disabled since July 15, 2000, and is at this time. He states her condition is permanent and stationary, and she has reached a point of maximum medical improvement.

T. She is not a candidate for vocational rehabilitation. (P.00365 - 00371)

C. TRIAL COURT PROCEEDINGS

Diversity jurisdiction was initially pled pursuant to 28 U.S.C. § 1132.

This case was originally filed in the Northern District of Oklahoma on February 27, 2003, alleging state court causes of action for breach of an insurance contract and insurance bad faith. The Plaintiff was a rural letter carrier with the United States Postal Service ("USPS") and had purchased coverage under a group insurance policy obtained through her Union, The National Rural Letter Carriers ("NRLCA"), the Collective Bargaining Union for the rural letter carriers. On April 22, 2005, Senior United States District Court Judge James O. Ellison entered an Order determining the matter was subject to ERISA jurisdiction and the case proceeded as a 29 U.S.C. § 1132(a)(1)(B) action with jurisdiction under 29 U.S.C. § 1132(e)(1). From there, the case proceeded as any ERISA case, and on January 20, 2006, the Trial Court found that the denial of benefits was arbitrary and capricious and remanded the matter to the Plan Administrator fair determination. (*Graham v. Hartford Life and Acc. Ins. Co.*, 2006 WL 160309 (N.D. Okl. January 20, 2006).

1. First Appellate Proceedings

Graham appealed from the Interlocutory Order regarding the application of ERISA, as well as the relief granted and later appealed a denial of attorney fees, which was consolidated by the Tenth Circuit. The Tenth Circuit determined that the Order remanding the matter to the Plan Administration for a fair determination was not a final appealable Order and dismissed the appeal. *Graham v. Hartford Life and Acc. Ins. Co.*, 501 F.3d 1153 (10th Cir. 2007).

2. First Petition for Certiorari to this Court

Graham sought certiorari to this Court from that ruling, which was denied. *Graham v. Hartford Life and Acc. Ins. Co.*, 128 S.Ct. 1650 (2008).

3. Second Trial Court Proceedings

The matter was resubmitted to the defendant under the administrative appeal process and once again, the request for benefits was denied by the defendant. A timely amended complaint from that denial was filed on August 4, 2008, again that complaint alleging state court causes of action and further requesting a jury trial. The defendant moved for judgment on the pleadings regarding the request for state court relief based on ERISA preemption and further moved to strike the jury

demand. Plaintiff once again argued that this was a government plan not subject to ERISA and, thus, the state court causes of action should not be preempted and, further, regardless of whether ERISA applied or not, this was a legal action for money damages under the terms and conditions of the contract and, thus, jury trial was guaranteed under the Seventh Amendment of the United States Constitution. On October 29, 2008, the Court granted partial judgment in favor of the defendant on the plaintiff's state court causes of action and struck the plaintiff's demand for jury.

The matter then proceeded on normal ERISA jurisprudence with an administrative record being submitted to the Court, no additional discovery being allowed. The parties briefing their positions and on March 13, 2009, the Court entered its Order upholding the defendant's July 24, 2008, final denial of plaintiff's claim.

4. Second Appellate Proceedings

Appeal was taken from that ruling and the Interlocutory Order to the Tenth Circuit Court of Appeal rasing three issues which are now presented to this Court. Jurisdiction to the Court under 29 U.S.C. § 1291.

The first issue is whether the subject disability insurance policy is subject to ERISA jurisdiction or if it is a government plan.

Plaintiff below further alleges she is entitled to jury trial under the Seventh Amendment because this is simply an action for money under the terms and conditions of this disability insurance policy.

Finally, if the two preceding issues do not dispose of this case, the petitioner requests the Court review the ultimate decision of the Tenth Circuit to see if it is in accord with this Court's pronouncement in *Metropolitan Life Ins. Co. v. Glenn*. 128 S.Ct. 2343, 171 L.Ed 2d 299 (2008). Petitioner's argument in this regard will be that the opinion of the Tenth Circuit continues to utilize special rules of evidence that this Court criticized in *Metropolitan v. Glenn, supra,* and, thus, does not follow the pronouncements of this Court in reviewing an administrative record.

REASONS THE PETITION SHOULD BE GRANTED

1. The Tenth Circuit's Pronouncement On Whether The Plan In Question Is Subject To ERISA Jurisprudence Is One of First Impression

When Justice Sotomayor was up for confirmation, one of the statements she was criticized for was that the Courts of Appeals make

the law. The reality is that this statement is absolutely correct. The Legislature may pass a law stating that it is actionable to discriminate in the workplace. It is up to the Courts of Appeal primarily to tell us what discrimination is and is not, what needs to be proven in order to make a case, and what viable defenses there are. One need only to look at any Table of Authority in any appellate brief to realize that case law is what determines the issues.

There is probably no area of the law that this is more true than the area of ERISA. In the next Section we will argue that the Circuit Courts of Appeal have determined an important and serious constitutional issue and that has been the law of the land for well over a decade. In the final section, we will argue that Courts of Appeals have created their own special rules of evidence regarding ERISA review, despite this Court's clear pronouncement that should not be done.

In this initial issue, it seems rather clear that this is a government plan. It is undisputed that this plan was established by the National Rural Letter Carriers Association which is an employee organization. As the Tenth Circuit pointed out in its Opinion, ERISA "applies to 'any employee benefit plan if it is established or maintained . . . by an employee organization or organizations representing employees engaged in commerce or in any

industry or activity affecting commerce,' 29 U.S.C. § 1003(a)(2)." 589 F.3d at 1353. It goes without saying that this Union represents only government employees. It goes without saying that this plan is funded totally by the government allotment or wages of these government employees. The Court of Appeals and Petitioner would agree that if a union representing government employees established a welfare benefit plan that was funded in all or in part by the government employer, either through collective bargaining or some other agreement, then that would be a government plan. The question then becomes what of a plan that is established by a union that is comprised solely of government employees and is funded completely by those employees' governmental wages.

In the case at bar, it was a requirement of the plan that the premiums for the disability insurance be paid out of the carriers' "governmental allotment" that they receive from the post office. The plan required that the beneficiaries execute an authorization with the post office to deduct the premium directly from their government allotment. It is undisputed then that this plan is funded totally by government wages.

In the case of *Hall v. Mun Employees Health Trust*, 93 F.Supp. 2d 73 (D.Me. 2000), the Court quotes from a Department of Labor Advisory

Opinion that gives us some insight on how the Department of Labor, at least, would deal with this particular question.

> "FN. 10. **According to the Department of Labor, a plan may still be an exempt governmental plan under ERISA if it is maintained by an employee organization.** In a very recent advisory opinion, the Department of Labor explained, 'the term governmental plan' also includes a plan administered by an 'employee organization,' within the meaning of ERISA §§ 3(4), that **provides benefits exclusively to employees of a political subdivision agency, or instrumentality of local government were also the only members of the empioyee organization, provided by the plan is funded exclusively by the government and by the government's employees who are members of the sponsoring employee organization.**' D.O.L. Op. 99-158 (November 9, 1999). The Department of Labor ultimately concluded that the plan in question, which was administered by an employee organization and it concluded one non-governmental employee, was excluded from ERISA as a government plan." (Emphasis added)

In its opinion, the Tenth Circuit stated that it was not persuaded by this and other Advisory Opinions

presented because the factual basis in all of those other opinions dealt with situations where the government entity itself contributed some or all of the premium benefits.

There simple is not a case that deals with a situation where an employee organization that is made up exclusively of government employees establishes a plan for those government employees and all of the funding for the plan comes from the government wages. The Department of Labor seems to tell us that under that scenario it would be deemed a government plan and the question that is begged is why is it not a government plan. What association does it have with any commerce or commercial activity that would warrant the plan being deemed an ERISA plan.

This opinion is the pronouncement of the highest court on this particular issue. As we have seen in other ERISA jurisprudence, it could be predicted that this pronouncement will eventually become the law of the land if this Court does not intervene.

2. This Court is the Protector of Individual's Constitutional Rights and Should be the Final Arbiter on this Question of Whether Under Certain Circumstances Right to Trial by Jury is Guaranteed in ERISA

The Seventh Amendment to our great Constitution, which is also the Seventh Article of the Bill of Rights, provides as follows:

> "In Suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of common law."

The lead case in the Tenth Circuit addressing the right to trial by jury, prior to the instant case is *Adams v. Cyprus Amax Mineral Co.*, 149 F. 3d 1156 (C.A. 10 1998). From a factual standpoint, that case appears to be significantly different and those are differences that mean something as we examine the right to trial by jury. That case involved 39 former employees of Amax Research and Development who were terminated as a result of a merger. The plaintiff claimed that upon termination, they were entitled to benefits under Amax Inc.'s Corporate Separation Policy for corporate employees referred to also as the Enhanced Severance Package. The Enhanced Severance Package was available to employees who were personnel at the company's corporate headquarters. The Plan did not define corporate headquarters. Thus, the issue in that case primarily was whether or not these 39 employees were

beneficiaries of the Plan at all. This is something the Court found significant in that they would have to first determine the "equitable" question of whether the plaintiffs were even beneficiaries under the Plan. Further this being a benefit plan rather than a welfare plan the funds were held in trust for the employees Of course, our case involves an insurance contract. Here, the Plaintiff paid a premium for this insurance policy out of her post-tax wages she received from the United States Post Office. There is no question that she is a beneficiary or insured under the policy and the question is whether or not she is entitled to benefits under the terms and conditions of the insurance policy. Unlike the self-funded plan where money is being held in trust, this is simply a contractual obligation to be paid by the insurance company out of its own coffers. In *Adams v. Cyprus, supra,* the Tenth Circuit determined that the action was really one in equity and, thus, a jury trial was not appropriate.

Below we argued that was in conflict with the United States Supreme Court case of *Great-West Life & Annuity Insurance Company v. Knudson,* 122 S.Ct. 708 (2002) which was decided after *Adams v. Cyprus, supra.* In *Knudson,* the insurance company was bringing an action for money damages seeking subrogation under the terms of an insurance policy. Significantly that action was brought under another section of the enforcement section, 29 U.S.C. § 1132(a) (3) which this Court

interpreted as only allowing an action that would be recognized in a court of equity. The Court determined that because the action was one legal in nature the case had to be dismissed.

> "Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money-relief that was not typically available in equity. "**A claim for money due and owing under a contract is 'quintessentially an action at law.'** " *Wal-Mart Stores, Inc. v. Wells*, 213 F.3d 398, 401 (C.A.7 2000) (Posner, J.). "Almost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Bowen v. Massachusetts*, 487 U.S. 879, 918-919, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (SCALIA, J., dissenting). And "[m]oney damages are, of course, the classic form of *legal* relief." *Mertens, supra*, at 255, 113 S.Ct. 2063. Nevertheless, petitioners, along with their *amicus*, the United States, struggle to characterize the relief sought as "equitable" under the standard set by *Mertens*. We are

not persuaded." 534 U.S. 204, 210, 122 S.Ct. 708, 713 (emphasis added)

There is a factual difference between *Adams v. Cyprus, supra,* and *Great-West Life v. Knudson, supra.* and the case at bar. In *Adams v. Cyprus, supra,* we are talking about a self-funded plan where the money is subject to being held in trust for the beneficiaries. The real question in that particular case is whether or not the 39 plaintiffs were beneficiaries and if so they were entitled to money out of this trust fund. In the Supreme Court case, we have a contact and there is no question that the insurance company and the beneficiary were parties to that insurance contract. The insurance company, in *Knudson,* is trying to enforce a contract provision that allows the insurance company to be reimbursed out of a third-party settlement. The actual money recovered in that case was not in the possession of the beneficiary because it was put into a trust under Court Order. Thus, the plaintiff/insurance company was simply seeking a monetary judgment against the defendant. The present factual situation is more similar to *Great-West v. Knudson, supra,* than *Adams v. Cyprus, supra.* Here, there is no money held in trust for the plaintiff but rather she paid a premium that went to the insurance company's general coffers and that is where the benefits will be paid.

Ignoring ERISA for a moment, it goes without saying that actions on insurance contracts are legal in nature and jury trials are allowed. "If the insurer has a duty to pay plaintiff's loss under the insurance contract, it is an obligation to pay money only and the damages recoverable are the amounts due by the terms of the insurer's obligation with interest." *Renfro v. Preferred Risk Mut. Ins. Co.*, 296 F. Supp. 1137, 1138 (D.C. Okla. 1969). It goes without saying that if Shirley Graham had deposited her paycheck in her checking account, and made a private transaction with the defendant for the same disability policy, she would be entitled to a jury trial. If the Court determines the first issue in her favor then she is entitled to a jury trial on her state court causes of action. In the case at bar, the only difference is that rather than wages first being deposited in her checking account, a deduction was first made and that deduction was sent to the insurance company.

The opinion of *Adams v. Cyprus, supra,* also conflicts with *Great-West v. Knudson, supra,* in another regard. The Tenth Circuit determined that 1132 (a)(1)(B) only authorized equitable actions. It rejected a holding made in the case of *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F.Supp. 745 (E.D. Mich. 1977), where the Court contrasted Section 1132(a)(1)(B) determining both legal and equitable actions can be brought under this section with Section 1132(a)(3) where the latter

only allowed an equitable action. The Tenth Circuit made the following observation in this regard:

> "FN3. The federal district court for the Eastern District of Michigan, in an early ERISA case, concluded there is an implied right to a jury trial in § 1132(a)(1)(B) itself. *Stamps v. Michigan Teamsters Joint Council No. 43,* 431 F.Supp. 745 (E.D.Mich.1977). The district court in *Stamps* reasoned that § 1132(a)(1)(B) would be surplusage in light of § 1132(a)(3) unless § 1132(a)(1)(B) was considered to create a legal, as opposed to an equitable, right. *Id.* at 746-47. We join a number of our sister circuits in concluding the reasoning in *Stamps* is flawed. *See Sullivan v. LTV Aerospace & Defense Co.,* 82 F.3d 1251, 1258 (2d Cir.1996); *Vorpahl,* 695 F.2d at 321; *Calamia v. Spivey,* 632 F.2d 1235, 1236-37 (5th Cir.1980); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund,* 627 F.2d 820, 828-29 (7th Cir.1980). Congress granted state courts concurrent jurisdiction only over § 1132(a)(1)(B) claims, *see* 29 U.S.C. § 1132(e)(1); thus, it was entirely rationale for Congress to separate § 1132(a)(1)(B) from the other equitable actions enumerated under § 1132(a)(3). "
> 149 F.3d @1159

In *Great-West v. Knudson, supra*, this Court validates the *Stamps* Court by finding that there is in fact a difference between Section 1132(a)(1)(B) and Section 1132(a)(3) and the types of actions that can be brought under each section stating:

> "In the very same section of ERISA as Section 502 (a)(3), Congress authorized 'A participant or beneficiary' to bring a civil action **'to enforce his rights under the terms of the plan,' without reference to whether the relief sought is legal or equitable**. 29 U.S.C. § 1132(a)(1)(B) (1994 Ed). But Congress did not extend the same authorization to fiduciaries. Rather, Section 502(a)(3), by its terms only allow for *equitable* relief. We will not attempt to adjust 'carefully crafted and detailed enforcement scheme' embodied in the test that Congress has adopted. *Mertens, supra*, at 254, 113 S.Ct. 2036. Because petitioners are seeking legal relief -- the imposition of personal liability of respondents for a contractual obligation to pay money -- Section 502(a)(3) does not authorize this action. Accordingly, we affirm the judgment of the Court of Appeals." At 718 (Italic emphasis Court's) (Bold emphasis added)

One of the differences that we believe is important is that this is a welfare plan as opposed

to a benefit plan. The Tenth Circuit states that it rejected the arguments petitioner made below because it ignored the equitable underpinnings of a Section 1132(a)(1)(B) action for benefits. In support of this, it cites the requirement of 29 U.S. C. § 1103(a) requiring, "all the assets of an employee benefit plan shall be held in trust by one or more trustees." As stated above, however, this a welfare plan, there are no assets being held in trust for Shirley Graham.

The Tenth Circuit further relies on the case of *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), in support of its conclusion that this is an equitable action. Here, again, I think the Tenth Circuit is missing the difference between an action brought under 29 U.S.C. § 1132(a)(3) and an action brought pursuant to 29 U.S. C. § 1132 (a)(1)(B), and the distinction this Court set out in *Great-West Life and Annuity Insurance Company v. Knudson, supra.* The action in *Mertens* was brought for breach of a fiduciary duty under 1132(a)(3) where the plaintiff was seeking a suit for money damages against an actuary. The plaintiff was seeking money damages. Just like in *Knudson*, the Court determined that you could not seek a judgment for money damages under that particular section. But this Court has at least indicated in *dicta* that there is no such restriction of the type of action brought pursuant to 1132(a)(1)(B). This action is one that would be brought in a court of law. These actions are being

brought in courts of law all of the times, right now in this country. As stated earlier, if this Court determines that ERISA does not apply to this action, then we will have a state court cause of action for breach of the insurance contract that will be presented to a jury. That is because we are seeking money under the terms of a contract and not seeking money held in trust.

In *Great-West Life & Annuity Insurance Company v. Knudson, supra,* it is clear that the Supreme Court made one important holding and a second important observation. The holding by the Supreme Court is that an action for money damages under a contract is one that is legal in nature. The efforts by the petitioner in that case, as well as the Solicitor General, to somehow characterize that action as one in equity simply did not impress the majority.

Second, the Court observed that an action brought under Section 1132(a)(1)(B) could be either for legal or equitable relief. Before the present case, there appeared to be no case that addresses the holdings and *dicta* in *Great-West Life & Annuity Insurance Company v. Knudson, supra,* as it would pertain to right to trial by jury.

3. IN THE INTEREST OF JUSTICE, THIS COURT SHOULD EXPLAIN AND AMPLIFY ITS RULING IN

METROPOLITAN LIFE INSURANCE CO. V. GLENN, 128 S.CT. 2343, 171 L.Ed. 2d 299 (2008)

When this Court decided the case of Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343, 171 L.Ed. 2d 299 (2008), ("*Glenn*"), this writer and others who represent insureds and beneficiaries were, to say the least, very excited. The reason why was simply because the *Glenn* case mirrored most of the cases that this writer has prosecuted over the years, an insured makes a claim for benefits, the benefits are initially paid, the insured obtains Social Security benefits, the medical records, for the most part, support the claim for disability and the plan administrator does a paper review, denies the benefits, and under some sort of substantial evidence review, the Court finds the denial must be upheld. In *Glenn*, this Court said that all factors must be taken into account. Prior to *Glenn*, we believe that was not done.

Unfortunately, it appears that the Tenth Circuit continues to use special formulas of evidence which view the insurance company's evidence in support of its denial with rose colored glasses and a jaundiced eye is turned toward evidence that supports the claim for disability. We believe that the standard that the Tenth Circuit enunciated when it decided this case is that type of special evidentiary rule really leaves out meaningful judicial review of the case. The Tenth Circuit cited the case

of *Kimber v. Thiokol*, 196 F.3d 1092, 1098 (10th Cir. 1999) as the rule it was using to review this case. However, the Court did not set out the entire rule and we think it is necessary to do that at this juncture.

> "The decision will be upheld unless it is "not grounded on *any* reasonable basis." *id.* (citation omitted). The reviewing court "need only assure that the administrator's decision fall[s] somewhere on a continuum of reasonableness-even if on the low end." *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287, 297 (5th Cir.1999). Given that standard of review and how the evidentiary support for Mr. Kimber's claim developed, we must affirm." @196 F.3d 1092, 1098

To see how this works in the case at bar, we would look at several of the comments and how the Tenth Circuit viewed this evidence. For example, the trial court and the Tenth Circuit relied almost entirely upon the report of Dr. Silver, who independently reviewed Graham's medical records and made several telephone calls, supposedly, to Dr. Emel. It was almost exclusively Dr. Silver's report and his account of the two telephone conversations he had with Dr. Emel that were the basis of the denial. The Tenth Circuit is absolutely correct when it states that we framed the issue as one were the contemporaneous

medical records conflicted with Dr. Silver's report of his telephone conversations with Dr. Emel and that these medical records generated contemporaneously eight years before this telephone conversation should take precedence. These records detract from these telephone conversations. The Court stated that the records did not establish Graham's disability. Interestingly enough, in support of Shirley Graham's disability, Dr. Emel wrote a letter on July 26, 2000, which was ten days after the beginning of the elimination period. In its Opinion, the Tenth Circuit seems to somehow surmise that when Dr. Emel wrote this letter, he was unaware of the plaintiff's exact job description and the fact that she had been put on limited duty. However, even in the letter Dr. Emel acknowledges the fact that the plaintiff had been placed on limited duty. The Court uses the way the doctor phrases his recommendation of disability in such a way that it is not a recommendation that she is disabled at the time the letter was written but that he was speculating some future disability. The doctor stated,

> "At this point, Mrs. Graham has significant osteoarthritis involving both knees and both ankles. An ambulatory job would be counterproductive for her. She has been on special duty for the last several years. She has given almost 25 years of continuous service to the Postal Service and **I really do**

> **not think she will be able to continue her work capacities** and recommend that you consider her for Disability retirement." (Emphasis added)

The fact that the doctor states that he does not think that Mrs. Graham **will be able to** continue her work capacities somehow makes the Court surmise that she is not disabled at the time of the writing of the letter but maybe will be sometime in the future. This is the type of review that was criticized by the Sixth Circuit in *Glenn* and this Court later on, and, it is against the clear reading of the medical records. Contained within these medical records are statements from Dr. Emel dated November 10, 2000, and December 12, 2000, to the Office of Workers Compensation that Shirley Graham continues to be temporarily, totally disabled. So, was disability maybe beginning sometime after July 26, 2000, but before that first letter of November 10, 2000, stating that Shirley Graham could still not return to work. This is an example of what happens when you have a rule of evidence that somehow seems to encourage a skewered view of the evidence in favor of the defendant and against the plaintiff.

Another example of this is how the Court dealt with the January 23, 2001, letter written by Dr. Emel and all of his other conclusions. The Court admits that this particular letter is in sharp contrast to two

Physical Capacity Evaluations forms that the doctor has just completed. The record indicates that on December 5, 2000, Dr. Emel filled out a Hartford form indicating that Shirley Graham can sit for two hours a day, drive one hour a day, and work a total of three hours. Less than a month later, on December 28, 2000, he filled out a second Physical Capacity Evaluation, this time stating that she could sit for one hour and work for a total of four hours a day. Obviously, strong support that Shirley Graham could not even do a sedentary job. Then we have this aberrant record that is quite similar to the record of Dr. Patel in *Glenn*. This one record is inconsistent with every thing else in the doctor's records, as is the conclusion that the doctor somehow opined eight years later in his telephone conversations with Dr. Silver that during the elimination period Mrs. Graham would have been capable of sedentary activity where she could sit for unlimited periods of time. This is inconsistent with the two Physical Capacity forms that Dr. Emel had filled out in December 2000, and these two Physical Capacity Evaluation forms, along with the other letters Dr. Emel had written to the OWCP and this defendant clearly detract from the telephone conversation that took place eight years later. On the Physical Capacity form dated December 28, 2000, which indicates that Shirley Graham could only sit for one hour at a time for a total of four hours and could only work for four hours a day, the doctor tells us that this is a permanent condition

from October 10, 2000, was permanent in nature, she had reached medical maximum improvement and would never be able to return to work. That detracts from Dr. Silver's account of what Dr. Emel said in the telephone conversation that occurred eight years after that document was prepared.

Likewise, the one prepared on December 15, 2000, detracts from those conversations. Although there is a slight difference in the ability to sit, he states in that report that she can sit for two hours at a time but only work for a total of three hours. He likewise states that the right knee is permanent from 3-8-74 and the left knee and left ankle are permanent from 10-25-95. Again, he tells us that the plaintiff has reached medical maximum improvement and cannot return to work in a lighter duty capacity. This statement seems to support the idea that on July 26, 2000, the doctor may very well have known that the special duty that Shirley Graham was put on was a sedentary job.

It also might support the proposition that he knew that on March 7, 2001. In the briefs before the trial court and the Tenth Circuit, we argued that the aberrant record of January 23, 2001, was recanted by Dr. Emel when he wrote a March 7, 2001, To Whom It May Concern letter. The Tenth Circuit dismissed our argument in regard to that letter stating "[i]n fact Dr. Emel's March 7, 2001, statement that Graham 'really should not sit for

more than one hour at any one time,' is not necessarily inconsistent with being able to perform a sedentary job." 589 F.3d @ 1360. What the doctor actually said was "this is the reason she can not continue to work even at her job at the post office since she can not drive for an hour and really should not sit for more than an hour at any one time." Of course, this is basically what he said in the two Physical Capacity statement, then going on to say in one that she could only work for three total hours and in the other for four total hours. But we note that he said, **"Even at her job at the post office"**. What does the doctor mean by even at her job at the post office? Does it maybe suggest that the doctor knew that she had been put on a limited duty, sedentary job when he said she cannot do her job. That certainly seems to be a more reasonable conclusion than the fact that Dr. Emel did not appreciate or understand that her job at the post office was a special accommodation to her condition. Remember the July 26, 2000, letter recommending early disability retirement, he acknowledges that she had been put on special duty for some time.

The petitioner believes that the Court did not appropriately weigh the factors as this Court has instructed in *Glenn*. In *Glenn*, this Court stated as follows:

We believe that *Firestone* means what the word "factor" implies, namely, that when judges review the lawfulness of benefit denials, they will often take account of several different considerations of which a conflict of interest is one. This kind of review is no stranger to the judicial system. Not only trust law, but also administrative law, can ask judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by weighing all together. See Restatement § 187, Comment *d*; cf., *e.g., Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415-417, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (review of governmental decision for abuse of discretion); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (review of agency factfinding).

In such instances, any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary depending upon the tiebreaking factor's inherent or case-specific importance

. . .

The Court of Appeals' opinion in the present case illustrates the combination-of-factors method of review. The record says little about MetLife's efforts to assure accurate claims assessment. The Court of Appeals

gave the conflict weight to some degree; its opinion suggests that, in context, the court would not have found the conflict alone determinative. See 461 F.3d, at 666, 674. The court instead focused more heavily on other factors. In particular, the court found questionable the fact that MetLife had encouraged Glenn to argue to the Social Security Administration that she could do no work, received the bulk of the benefits of her success in doing so (the remainder going to the lawyers it recommended), and then ignored the agency's finding in concluding that Glenn could in fact do sedentary work. See *id.*, at 666-669. This course of events was not only an important factor in its own right (because it suggested procedural unreasonableness), but also would have justified the court in giving more weight to the conflict (because MetLife's seemingly inconsistent positions were both financially advantageous). And the court furthermore observed that MetLife had emphasized a certain medical report that favored a denial of benefits, had deemphasized certain other reports that suggested a contrary conclusion, and had failed to provide its independent vocational and medical experts with all of the relevant evidence. See *id.*, at 669-674. **All these serious concerns, taken together with some degree of**

> **conflicting interests on MetLife's part, led the court to set aside MetLife's discretionary decision**. See *id.*, at 674-675. We can find nothing improper in the way in which the court conducted its review.
> *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2351 -2352 (U.S.,2008)(Emphasis added)

As stated above, any one factor could be a tiebreaker. We have already discussed the fact that Dr. Emel clearly supported Shirley Graham's quest for disability, that there is one aberrant record, just like in *Glenn*, and the contemporaneous medical records and opinions of Dr. Emel should detract from the accounts of the hearsay conversation of between Dr. Emel and Dr. Silver to an extent that the conversations should be ignored. But then we have one final factor and that is the fact that the Department of Labor did approve Shirley Graham's early retirement. That fact was not even mentioned in the denial letter, and the Court did not know how the administrator dealt with it. We do know the Civil Service Retirement System concluded that the medical evidence presented to the agency indicated that accommodations were not possible due to her severity of her medical requirements, acknowledging that she had been put on limited job duty, that she is unable to even perform those duties, which all seems consistent with what Dr.

Emel was telling the Department of Labor and the Workers Compensation Office.

Finally, we would point out that the entire report of Dr. J.D. McKenzie was set out in the Abstract of the Administrative Record in our Opening Brief. That report was set out in its totality.

Even on a cursory review, it is evident that the Court of Appeals cavilled when viewing the evidence in support of benefits and simply ratified without any scrutiny whatsoever the evidence in support of the denial. The fact that the record reflects that Dr. Silver admits Dr. Emel did not review his medical records in the two conversations between the two doctors regarding Dr. Emel's patient's condition eight years earlier. The special rules of evidence that we set out above almost require the Courts to distort their view of evidence with a hypercritical view of the evidence in opposition to the denial, even to the point of engaging in rank speculation as to what a doctor meant or knew, and giving the evidence in support of the denial a pass regardless of the glaring deficiencies and criticisms that evidence might warrant. The net effect is that it deprives beneficiaries in the position of Shirley Graham from a meaningful judicial review.

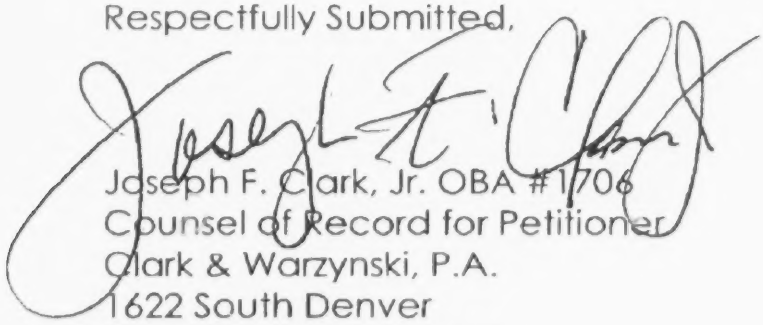
CONCLUSION

The plan in question was established by a union comprised of government employees and funded by deductions from their government allotment. It is a government plan.

The petitioner sought benefits, money, under the terms of the plan. She has a constitutional right to trial by jury.

As long as the courts below continue to utilize special rule of evidence criticized by this Court beneficiaries and participants will be denied meaningful judicial review.

Respectfully Submitted,



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Case: 09-5043 Document: 01018338469
Date Filed: December 29, 2009

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIRLEY A. GRAHAM,

Plaintiff-Appellant.

v. No. 09-5043

HARTFORD LIFE & ACCIDENT INSURANCE COMPANY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:03-CV-00144-E)

Joseph Clark, Jr., Clark & Warzynski, P.A., Tulsa. Oklahoma, for Plaintiff-Appellant.

Timothy A. Carney, (Erin K. Dailey with him on the brief) Gable & Gotwals, Tulsa. Oklahoma, for Defendant-Appellee.

Before BRISCOE, McKAY, and HARTZ, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff-Appellant Shirley Graham appeals the district court's adjudication of her claim for disability benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. She raises three issues on appeal: (1) whether the district court properly determined that her disability benefits plan with Defendant-Appellee Hartford Life & Accident Insurance Co. ("Hartford") did not qualify as a "governmental plan" pursuant to 29 U.S.C. § 1002(32); (2) whether the district court properly determined that Graham was not entitled to a jury trial on her claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B); and (3) whether the district court properly determined that Hartford's ultimate denial of disability benefits was not arbitrary and capricious. We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

I

From November 1976 until July 2000, Graham was an employee with the United States Postal Service ("USPS"), Administrative Record ("A.R.") at 544. She began her career as a Rural Letter Carrier, but due to physical health problems the USPS changed her position on June 7, 1997 to Modified Rural Carrier, a sedentary desk job that required

intermittent walking, standing, and lifting. Id. At 196-97. Increased knee and ankle pain caused Graham to take a leave of absence on July 17, 2000, under the Family and Medical Leave Act. Id at 496-99. The United States Office of Personnel Management ("OPM") granted her disability retirement on December 1, 2000. *Id.* 453-54.

The Plan

The National Rural Letter Carriers Association ("NRLCA"), recognized by the CSPS as the exclusive bargaining representative for rural letter carriers, offered its members a long term disability income protection plan. R. at 109-10. Although the NRLCA and USPS entered into a collective bargaining agreement, that agreement did not require the USPS to provide rural letter carriers with disability benefits. rd. at 271-72. To that end, the NRLCA contracted separately with Hartford to provide such a plan. It announced the plan to its members in the following letter:

> Dear Member:
>
> The [NRLCA] is pleased to offer a long term disability income protection plan for its regular rural carrier (Designation 71) members .
>
> . . . Postal employees do not have a long term disability plan that is sponsored by the [USPS]. So, the NRLCA has worked diligently over the past several years to develop and sponsor a disability income plan for its regular carrier members.
>
> . . .

> The Plan is sponsored by the NRLCA and underwritten by [Hartford].

Id. at 109. The accompanying brochure indicated that the plan was "[u]nderwritten by" Hartford and "[a]rranged and [a]dministered by" the NRLCA'5 Group Insurance Department. *Id.* at 118. Though participation in the plan was completely voluntary. the brochure indicated that enrollment was available "only through government allotment.[1]" *Id.* at 116. To request coverage. participating members needed to authorize the USPS to "make the appropriate deductions from [their] wages" and to release any information, including salary information, necessary for enrollment in and administration of the plan, *Id.*. at 120. The Certificate of Insurance declared the NRLCA to be the policyholder, Hartford the issuer, and the USPS the employer, *Id.* at 126-27. Graham enrolled in the plan on January 28, 1997. A.R. at 489.

Pursuant to the terms of the plan, disability benefits become payable if:

> 1. you become Totally Disabled while insured under this plan;

---

[1] Although the brochure did not define "government allotment," it explained that to enroll in the plan, employees needed to complete direct deposit paperwork that would enable enrolled employees' "direct deposit premium payments [to] be deducted from [their] paycheck[s]." R. at 106.

2. you are Totally Disabled throughout the Elimination Period;
3. you remain Totally Disabled beyond the Elimination Period;
4. you are, and have been during the Elimination Period, under the Regular Care of a Physician; and
5. you submit Proof of Loss satisfactory to us.

Id. at 105. Under the plan, "Totally Disabled" means that

1. during the Elimination Period; and
2. for the next 24 month(s), you are prevented by:
   a) accidental bodily injury;
   b) sickness;
   c) Mental Illness;
   d) Substance Abuse; or
   e) pregnancy,

from performing the Essential Duties of Your Occupation,
and as a result you are earning less than 20% of your Predisability Earnings, unless engaged in a program of Rehabilitative Employment approved by us.

Id. at 116. The plan defines Elimination Period as the "period of time you must be Totally Disabled before benefits become payable." *Id.* at 102. The parties do not dispute that given the coverage option Graham selected, her Elimination Period started on July 16, 2000 and lasted until October 14, 2000.

Combining all these elements together, the essential question concerning Graham's entitlement to disability benefits is whether an accidental bodily injury prevented her from performing the Essential Duties[2] of her occupation from July 16,2000 until October 14, 2000.

Medical History

When Graham began experiencing physical health problems, she became a patient of Dr. T. Jeffrey Emel, M.D., a doctor associated with the Eastern Oklahoma Orthopedic Center, Inc. ("Orthopedic Center"). On February 7, 1994, Graham twisted her right knee while delivering mail. *Id.* at 227. She injured that knee again the following month. and underwent surgery in July 1994. *Id.* Her knee pain persisted and she underwent another procedure in March 1997. *Id.* On April 18, 1997, a member of the Orthopedic Center wrote a letter to the United States Department of Labor's Office of Workers' Compensation Programs ("OWCP"). The letter recommended Graham for "sedentary work endeavors:" Graham "n eed[ed] to be primarily off her feet for the most part," and should be permanently restricted from "carrying mail" or "'working up on her feet for any significant periods

---

[2] The plan defines "Essential Duty" as a duty that (I) "is substantial, not incidental;" (2) "is fundamental or inherent to the occupation; and" (3) "cannot be reasonably omitted or changed." A.R. at 114.

of time." *Id.* at 226. The USPS responded by moving Graham into a Modified Rural Carrier position on June 7, 1997. *Id.* at 196-97.

On October 1998, Graham injured her left foot and ankle at home. *Id.* at 229-30. Dr. Emel diagnosed her with a "[g]rade I + deltoid sprain with lateral ankle sprain as well." *Id.* at 230. By November 1998, Graham was "making progress with her ankle," *Id.* at 232.

Graham experienced knee and ankle pain throughout 1999 and early 2000. By early 2000, however, her medical records indicate that her treatment had reduced the pain she was experiencing in both her ankle and knee. Although Graham's right knee was "symptomatic" in March 1999, id. at 233, and had "flared up again" in May 1999, id. at 234, Graham received an injection of corticosteroid and three injections of Synvisc in her right knee in November and December 1999, id. at 238-41. On January 11, 2000, Dr. Emel reported to the OWCP that the Synvisc injections provided "good relief;" by that point, Graham had "no swelling and actually the knee pain [was] significantly decreased," *Id.* , at 242.

Graham's left ankle began "f1ar[ing] up" in August 1999. *Id.* at 235. Despite some improvements in September, Dr. Emel noted in October that Graham's ankle was "still swollen but becomes even more swollen and symptomatic if she is not taking her Vioxx." *Id.* at 236-37. When Graham's ankle was "still causing her pain" on January 11, 2000, Dr. Emel ordered an MRI, which

revealed a "ganglion cyst." Id. at 243, 248-49. Graham underwent cyst removal and biopsy surgery in late February 2000. Id. at 257. Her follow-up evaluation on March 21,2000 indicated that Graham "overall [was] doing significantly better in terms of her former discomfort." Id. at 260. In addition, the operating physician had indicated in his consultation notes that Graham would likely be able to return to work within weeks after this procedure. Id.. at 249.

Graham's leave of absence commenced on July 17,2000. Although Dr. Emel indicated in her Family and Medical Leave Act paperwork that Graham suffered from "ankle osteophytes, bone cyst, [and] osteoarthritis knees & ankles," id. at 497, the administrative record does not contain any other description of the change in Graham's condition after her March 21,2000 follow-up evaluation. With respect to the Elimination Period and shortly thereafter, the administrative record reveals the following documentation:

- On July 26, 2000, Dr. Emel reported to the OWCP that Graham experienced "irritation in her knee." Noting that Graham's ankle surgery "caused her to have to bear more weight on the knee," and that "[h]er ambulation at work seems to exacerbate all this," Dr. Emel gave Graham's knee an injection and noted to cheek her after two weeks. Id. at 259.
- On July 28, 2000, Graham's ankle was "still having quite a bit of swelling." Dr. Emel gave

Graham an injection and noted to check her after two weeks. Id. at 263.

- On August 10,2000, Graham's ankle and knee had both "improved." Id. at 264-65. Dr. Emel suggested continuing Synvisc injections for her knee because "she does get good relief from that." Id. at 265.
- Graham received three more Synvisc injections on August 30, September 7, and September 15. Id. at 266-68.
- On October 13, 2000, Dr. Emel reported to the OWCP that Graham was "only minimally improved. The Synvisc [had] some sort of flare reaction after the last injection, although that subsided." Id. at 269. Dr. Emel continued her medication and treatment for a month.
- On November 10, 2000, Dr. Emel reported that Graham was "about the same. She is still not ready to return to work yet." Graham's knee was "hurting" despite the injections. Id. at 270.
- On November 15, 2000, Dr. Emel noted that Graham's "left ankle and left knee [were] both acting up." Id. at 271. X-rays revealed that the ankle joint "actually look[ed] pretty good," and Dr. Emel gave her ankle an injection. Id..
- On December 5, 2000, Dr. Emel noted that Graham received "good relief' with her left knee pain, but her left ankle "did not respond quite as well." Id.. at 272. He noted that "[s]he is still not in a position where she can work." Id.

- On December 12, 2000, Dr. Emel reported to the OWCP that Graham's right knee was "still giving her problems but it has calmed down now." Id. at 273. He concluded that "[s]he is still temporarily totally disabled." Id.
- On January 8, 2001, Dr. Emel reported to the OWCP that Graham "started having more severe pain" with her right knee. His impression was that Graham had "[d]egenerative joint disease" in her right knee. Id. at 471.

Procedural History

As stated earlier, the USPS reassigned Graham to a Modified Rural Carrier position on June 7, 1997. The position involved "[g]eneral clerical work for [the] Maintenance Department[,] [s]imple, filing, answering phones, occasional simple computer use, completion of reports, and other duties as assigned within documented restrictions." Id.. at 196. The physical requirements were "2 hours each intermittent walk/stand. 1 hour intermittent lift up to 10 lbs. No climb, kneel, twist. Minimal intermittent bend/squat. No push/pull. Sedentary work." Id.. Because Graham maintained this position for at least six months prior to her leave of absence. Hartford concluded that it qualified as her "occupation" for determining her eligibility for long term disability benefits. Id. at 1,475.

Graham applied for disability retirement with the USPS on July 25, 2000. Id. at 575. On July 26,

2000. Dr. Emel wrote to the OWCP, recommending Graham for disability retirement:

> At this point, Mrs. Graham has significant osteoarthritis involving both knees and both ankles. An ambulatory job would be counterproductive for her. She has been on special duty for the last several years. She has given almost 25 years of continuous service to the Postal Service and I really do not think she will be able to continue her work capacities ....

Id. at 261-62. The OPM granted Graham disability retirement on December 1, 2000. Id. at 557-58.

Graham applied for disability benefits under the NRLCA plan on October 27, 2000. Id. at 579. 584. As part of its evaluation, Hartford asked the. USPS to complete a Physical Demands Analysis Form. Id. at 537. A human resources specialist indicated on the form that "[in] an 8 hour workday, an individual in [the Modified Rural Carrier] position must" sit for eight hours, intermittently stand for two hours (with rest), and intermittently walk for two hours (with rest), Id.

Hartford also asked Dr. Emel to complete a Physical Capacities Evaluation Form, When Dr. Emel first completed the form on December 15, 2000, he indicated that Graham could only sit for two hours a day and drive for one hour a day. In total, he indicated that Graham could only work a daily maximum of three hours. Id. at 531. When Dr. Emel

completed the form again on December 28, 2000, he indicated that Graham could sit for one hour at a time, for a total of four total hours per day, and Graham could drive for one hour a day. In total, Dr. Emel indicated that Graham could work a daily maximum of four hours. Id. at 514-15.

As a follow-up to these forms, Hartford faxed Dr. Emel the following clarification: "How do [Graham's] conditions of 'ankle osteophytes' and 'osteoarthritis of both knees and ankles' affect her ability to perform a sedentary occupation? Please describe how these conditions affect her ability to sit." Id. at 480. On January 23, 2001, Dr. Emel responded with "no it does not but patient has retired." Id. at 479-80. Principally relying on this follow-up, Hartford denied Graham's claim for benefits on February 28, 2001. Id. at 18.

On April 9, 2001, Graham appealed the denial through Hartford's administrative appeal process. Id. at 447. As part of her appeal, Graham submitted a March 7, 2001 letter from Dr. Emel, which reported that a recent MRI of Graham's left knee revealed "severe chondromalacia of the patellofemoral mechanism," Id. at 448. In Dr. Emel's opinion, this "explain[ed] why any prolonged sitting cause[d] [Graham] a great amount of pain and discomfort," and why Graham "cannot continue to work even at her job at the post office since she cannot drive for an hour and really should not sit for more than an hour at anyone time," Id. Hartford denied her appeal because Graham's sedentary position was flexible enough to allow her to

"stand or walk as needed." Id. at 442-44. Graham appealed again on September 26, 2001, asking Hartford to "review ALL the information," and claiming that her injuries caused sleeping problems. Id. at 439-40. Hartford denied her appeal again because Graham provided no medical evidence of a sleep disorder and none of her medical records evidenced the severity of pain she claimed to experience, Id. at 388-90. Graham appealed again on February 21, 2003, but Hartford denied that appeal because she had exhausted the plan's administrative remedies. Id. at 350.

Graham brought suit against Hartford in the United States District Court for the Northern District of Oklahoma, asserting a state law claim for breach of the duty of good faith and fair dealing, On April 22, 2005, the district court concluded that the NRLCA disability benefits plan did not qualify for ERISA's "governmental plan" exemption. As a result, ERISA preempted Graham's state law claim, and Graham was restricted to pursuing a claim for benefits under 29 U.S.C. § 1132(a). After reviewing Graham's administrative record, the district court concluded that Hartford's denial of disability benefits was arbitrary and capricious, and remanded the case to the plan administrator for a full and fair determination of her claim. Graham appealed, but we dismissed her appeal for lack of appellate jurisdiction. Graham v. Hartford Life & Accident Ins. Co., 501 F.3d 1153. 1154. (l0th Cir. 2007); cert. denied, 128 S. Ct. 1650 (2008).

On remand, Hartford retained Dr. Stephen A. Silver, M.D., a board certified orthopedic surgeon,

to examine Graham's medical records to define her "functional limitations" both during and beyond the Elimination Period (July 16, 2000 through October 14, 2000). A.R. at 170. In his report, Dr. Silver summarized the records that he reviewed, and reported that he spoke to Dr. Emel about Graham's condition. Dr. Emel indicated that Graham "'can sit for an unlimited period of time but can stand for no longer than approximately 15 minutes and [can] walk for no more than 15 minutes. He feels that she cannot lift anything more than 10 lbs. due to a problem with respect to her back." Id. at 174. After reciting Dr. Emel's opinion, Dr. Silver then reached the following conclusion with respect to Graham's physical limitations:

> It is my opinion that based on the information provided that Shirley Graham [was] capable of sedentary level activity from 7-16-00 to 10-14-00 where she can sit for unlimited periods of time and lift up to 10 lbs. It is my opinion she can perform some form of ambulation around her office for approximately 15 to 20 minutes as noted by Dr. Ernel. She can engage in fine manipulation with respect to her hands. In summary, it is my opinion that both the information provided as well as conversation with Dr. Emel bear out this woman having a capacity for sedentary work from 7-16-00 to 10-14-00 and beyond.

Id. at 174.

In response to this report, Hartford asked Dr. Silver three clarifying questions. First, Hartford asked if Dr. Emel's opinion specifically addressed Graham's limitations during the Elimination Period. Id. at 162. Dr. Silver responded that when he spoke with Dr. Emel he was "not sure [Dr. Emel] remembered 8 years earlier. He did not go back thru the medical records." When Dr. Silver again contacted Dr. Emel for further clarification, Dr. Emel said that although Graham "was 50lbs heavier at that time," Dr. Emel "felt the restrictions would probably be the same but did not elaborate." Id.

Second, in light of the conflicting Physical Capacities Evaluation Forms that Dr. Emel had previously completed, Hartford asked if Dr. Emel agreed that during the Elimination Period Graham could sit "most of the time in an 8 hour day if she could change positions whenever necessary."Id. at 162. Dr. Silver's answer was "see [answer] #1." Id. at 163.

Third, Hartford asked Dr. Silver to clarify his conclusion that Graham could perform ambulatory activity for approximately 15-20 minutes a day. Id. Dr. Silver responded that "Dr. Emel feels the claimant can sit for 8 hours a day and stand/walk [for] 15-30 minutes 3 to 4 times daily but not on a frequent basis. I concur with Dr. Emel on this." Id.

Hartford again denied Graham disability benefits on July 24, 2008. Id. at 1-9. Hartford concluded that after reviewing the documents in the claim file, obtaining independent physician

review, and further consulting with Dr. Emel, "it appears that for the period 7/16/00 through 10/14/00 Ms. Graham was functionally capable of performing the duties of her sedentary occupation of Modified Rural Carrier." Id. at 9. Hartford's denial letter reflects that it considered two additional pieces of correspondence from Dr. Emel that are pertinent to this appeal. The first is an August 1, 2002 letter, purportedly authored by Dr. Emel[3] that explains that Graham "is really not capable of doing even sedentary work for long periods of time. Her knees are rapidly deteriorating and will require a total joint arthroplasty probably in the next three to five years," Id. at 275. The letter further stated ""[t]here is no gainful employment for her to do at the post office," Id. The second is a January 28, 2004 letter from Dr. Emel, explaining that Graham had suffered metatarsal fractures in her feet, and opining that Graham "has been unemployable for the last 2-3 years at least." Id. at 277.

Graham again brought suit against Hartford, asserting an action for benefits under 29 U.S.C. § 1132(a)(1)(B), and state law claims for breach of an insurance contract and bad faith. On October 29, 2008, the district court determined that ERISA preempted Graham's breach of contract and bad faith claims, as well as her request for punitive damages. The district court also determined that Graham had no Seventh Amendment right to a jury

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[3] The photocopy contained in the record does not indicate who signed the letter.

trial on her § 1132(a)(1)(B) claim for benefits. On March 13,2009, the district court ruled that Hartford's denial of benefits was not arbitrary and capricious.

II

Graham first challenges the district court's determination that the NRLCA disability benefits plan did not qualify for ERISA's "governmental plan" exemption. This is a legal conclusion we review de novo. Gualandi v. Adams, 385 F.3d 236, 242 (2d Cir. 2004).

Title I of ERISA, which "governs the Protection of Employee Benefit Rights" at issue in this dispute, Esden v. Bank of Boston, 229 F.3d 154, 173 n.23 (2d Cir. 2000) (quotations omitted), applies to "any employee benefit plan if it is established or maintained ... by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce," 29 U.S.C. § 1003(a)(2). However, an employee benefit plan is exempt from the provisions of Title I if it qualifies as a "'governmental plan." Id. § 1003(b)(1). The parties do not dispute that unless the NRLCA benefits plan qualifies as a governmental plan, ERISA governs its administration.

Title I of ERISA defines a "governmental plan" as "a plan established or maintained for its employees by the Government of the United States. by the government of any State or political subdivision thereof, or by any agency or

instrumentality of any of the foregoing." 29 U.S.C. § 1002(32). ERISA's definition of a "governmental plan" "focuses on the public entity ... that 'established or maintained' the plan. ERISA deems these *publicly-spawned* plans to be exempt." McGraw v. Prudential Ins. Co. of Am., 137 F.3d 1253, 1257 (l0th Cir. 1998) (emphasis added). The definition of a "governmental plan" also creates a disjunctive standard: "a plan need only be established or maintained by a governmental entity in order to constitute a governmental plan." Gualandi, 385 F.3d at 242 (emphasis in original). In light of this emphasis, the issue becomes whether the USPS "established or maintained" the NRLCA disability benefits plan for its employees.

It is apparent that the USPS did not "establish" the NRLCA disability benefits plan. The plan was also not the product of collective bargaining; instead. the NRLCA contracted separately with Hartford to provide disability benefits. Cf. Lovelace v Prudential Ins. Co of Am., 775 F. Supp, 228, 229 (S.D. Ohio 1991)("A plan established by a government employer through collective bargaining meets the ERISA 'governmental plan' requirements"). The USPS did not contribute payments toward the disability insurance premiums; rather, its rural letter carriers authorized deductions from their paychecks to pay for them. Cf. Gualaodi, 385 F.3d at 244. ("[E]xclusive governmental funding is enough to constitute governmental establishment of a plan."); Fromm v. Principal Health Care of Iowa, Inc., 244 F.3d 652, 653 (8th Cir. 2001) (per curiam) ("'Because the City paid the insurance premiums under the health care plan selected by the

employees, the plan is deemed to be established and maintained by the City."). Conceding that the USPS did not "establish" the plan, Graham instead argues that the USPS "maintains" the plan because it plays an "integral part of the [p]lan's operation." Aplt.', Reply at 12.

Upon review of the plan documentation, we find no support for the view that the USPS "maintains" the plan. While the certificate of insurance designated the NRLCA as the policyholder and Hartford as the insurer, it only named the USPS as the employer. The explanatory brochure accompanying the NRLCA invitation letter indicated that the plan was "[a]rranged and [a]dministered by" the NRLCA's Group Insurance Department. R. at 118. In fact, the USPS's only involvement with the administration of the disability benefits plan is to make payroll deductions and to release to Hartford any information necessary for enrollment in and administration of the plan. This involvement is minor, almost clerical and it is insufficient to support the conclusion that the USPS "maintains" the plan.

Graham fails to cite any authority that supports her assertion that the forwarding of payroll deductions and the release of employee information constitutes "maintaining" a plan under § 1002(32). She relies on several Department of Labor Advisory Opinions for the idea that a governmental plan "also includes a plan administered by an 'employee organization' ... that provides benefits exclusively to employees of a [governmental entity] who are also the only members of the employee

organization, provided that the plan is funded exclusively by the government and by the government's employees who are members of the sponsoring employee organization." Dep't of Labor ERISA Op. Letter No, 99-15A (Nov, 19, 1999), 1999 WL 1252003 at *2. We note that "'[a]gency opinion letters 'do not warrant Chevron-style deference;'" instead, agency opinion letters warrant "'respect ... only to the extent that those interpretations have the power to persuade. ". Clements v. Serco. Inc., 530 F.3d 1224,1229 (l0th Cir. 2008) (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)). We do not find these advisory opinions persuasive because they each rest upon a factual predicate which differs from the facts of the case at hand: each of the advisory opinions that Graham references concern benefit plans established pursuant to a collective bargaining agreement where the governmental employer at least partially contributes to the plans on behalf of its employees.[4]

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[4] See Dep't of Labor ERISA Op. Letter No. 2000-06A (May 17, 2000), 2000 WL 744360 at *3 (concluding that three plans established for patrol officers qualified as governmental plans because each plan was established pursuant to a collective bargaining agreement with the city, the city provided all of the contributions to the plan except for the contributions covering the plans' private sector participants, and the city exercised oversight control over the plans); Dep't of Labor ERISA Op. Letter No. 2000-04A (Mar. 30, 2000), 2000 WL 1154961 at *2 (concluding that a plan qualified as a governmental plan because it was maintained pursuant to a collective bargaining agreement and was "substantially

Accordingly, we reject Graham's argument that the NRLCA disability benefits plan qualifies as a "governmental plan."

III

Graham next argues that district court improperly determined that she was not entitled to a jury trial on her claim for disability benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). This is a question of law that we review de novo. Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156, 1158 (10th Cir 1998).

This court, along with several of our sister circuits, has concluded that the Seventh Amendment guarantees no right to a jury trial in a §

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funded by contributions from the City with the remaining contributions being made by the Plan's participants"); Dep't of Labor ERISA Op. Letter No. 99-15A (Nov. 19. 1999), 1999 WL 1252003 at *2 (noting that a school district fund was a governmental plan because it was established pursuant to collective bargaining that required the school district to contribute to the fund on behalf of each employee, even though the fund covered one non-governmental employee); Dep't of Labor ERISA Op, Letter No. 95-25A (Oct. 3, 1995), 1995 WL 582729, at *2-3 (concluding that benefit arrangements maintained by a police officer's relief association were governmental plans; even though the association did not have a collective bargaining agreement with the police department, the police department was required, pursuant to collective bargaining agreements with other employee organizations, to contribute the majority of funding to the benefit arrangements).

1132(a)(1)(8) action for benefits.[5] In our decision in Adams, the plaintiffs brought an action for benefits under § 1132(a)(I)(B) contending that they satisfied the definition of "corporate employees" contained in an enhanced severance plan. In determining that there was no right to a jury trial for such a claim, we outlined the legal standard

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[5]See, e g., Reese v. CNH Am. LLC., 574 F.3d 315, 327 (6th Cir 2009) (reaffirming its prior holding that "the Seventh Amendment does not guarantee a jury trial in ERISA and LMRA cases because the relief is equitable rather than legal"); McDougall v. Pioneer Ranch Ltd. P'ship, 494 F.3d 571,576 (7th Cir. 2007) ("The general rule in ERISA cases is that there is no right to a jury trial because ERISA's antecedents are equitable, not legal.") (quotations and citations omitted); Thomas v. Or. Fruit Prods. Co., 228 F.3d 991, 997 (9th Cir. 2000) ("[W]e hold that tbe remedies available to a participant or beneficiary under ERISA are equitable in nature and the Seventh Amendment does not require that a jury trial be afforded for claims made by participants or beneficiaries. ") Tischmann v. ITT/Sheraton Corp., 145 F.3d 561, 568 (2d Cir. 1998)
("[C]ases involving ERISA benefits are inherently equitable in nature, not contractual, and [] no right to jury trial attaches to such claims.") (quotations and citations omitted); Blake v. Unionmutual Stock Life Ins, Co. of Am., 906 F.2d 1525,1526 (11th Cir. 1990) (per curiam) ("[This Circuit has held that plaintiffs are not entitled to a jury trial under ERISA when the issue is whether it was arbitrary or capricious for benefits to be denied."); Turner v. CF & I Steel Corp., 770 F.2d 43, 47 (3d Cir. 1985) ("[N]o jury trial is required in suits under § 502{a)(1)(B) by a beneficiary or participant against a trustee,"); In re Vorphal, 695 F.2d 318, 320-22 (8th Cir. 1982) ("[W]e conclude that a jury trial is not required under section 502.").

governing the right to a jury trial under the Seventh Amendment as
follows:

> The Seventh Amendment preserves the right of trial by jury in Suits at common law, where the value in controversy shall exceed twenty dollars. . . [T]he Seventh Amendment applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. To determine whether a particular statutory action more closely resembles an 18th century case tried in a court of law or one tried in a court of equity, we must examine both the nature of the statutory action and the remedy sought The more important factor is whether the remedy sought is legal or equitable in nature.

Id. at 1159 (citations, internal quotations, and alterations omitted). Applying this standard, we concluded that the plaintiffs' § 1132(a)(1)(8) action was equitable in nature because the "threshold determination of whether Plaintiffs [were] eligible to receive assets held in trust by the Defendants ... must be guided by principles of trust law." Id. at 1161. The remedy sought, which was the recovery of benefits, was also equitable because it was

"better characterized as equitable/restitutionary versus legal/compensatory relief." Id. at 1162.

Notwithstanding our precedent, Graham argues that we should revisit this issue in light of the Supreme Court's decision in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002). Knudson analyzed the nature of a cause of action under § 1132(a)(3); it did not address the nature of a beneficiary's cause of action under § 1132(a)(1)(B), and therefore did not directly impact our prior ruling in Adams. See Reese, 574 F.3d at 327 ("Knudson, first and foremost, is not a Seventh Amendment case."). Nonetheless, Graham points to a specific concluding remark in Knudson in which the Court, comparing the statutory language of subsection § 1132(a)(3) with § 1132(a)(1)(B), noted that (a)(1)(B)'s language is "without reference to whether the relief sought is legal or equitable." Id. at 221. Building upon this statement, Graham argues that "most actions by beneficiaries are really for money obligations under the terms of a contract," and thus are "legal in nature, rather than equitable." Aplt.'s Br. at 39.

We reject this argument because it ignores the equitable underpinnings of a § 1132(a)(1)(B) action for benefits. "ERISA abounds with the language and terminology of trust law." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). For example, the statute generally requires that "all assets of an employee benefit plan shall be held in trust by one or more trustees," 29 U.S.C. § 1103(a), and that each benefit plan is "established and maintained pursuant to a written instrument" that

names a fiduciary with the "authority to control and manage the operation and administration of the plan," 29 U.S.C. § 1103(a)(1). Additionally, ERISA's "fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts." Firestone, 489 U.S. at 110 (quotations, citations, and alterations omitted). Because "Congress borrowed from the common law of trusts in enacting ERISA," Varity Corp. v. Howe, 516 U.S. 489, 528 (1996), trust law often provides a useful starting point interpreting its statutory provisions. See Beck v. PACE Int'l Union, 551 U.S. 96, 101 (2007) (noting that whether an employer is functioning as a plan sponsor or plan administrator "is an inquiry that is aided by the common law of trusts which serves as ERISA's backdrop"); Varity Corp., 516 U.S. at 497 ("[W]e believe that the law of trusts will often inform, but will not necessarily determine the outcome of, an effort to interpret

ERISA's fiduciary duties."); Firestone, 489 U.S. at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(l)(B), we are guided by principles of trust law.").

As we recognized in Adams, it is not surprising, given ERISA's trust law antecedents, that "courts consistently have characterized ERISA actions, including § 1132(a)(1)(B) actions, akin to common law trust actions and thus governed by common law trust principles." 149 F.3d at 1160. Framed in this light, we have decided that the proper common law analogue for a § 1132(a)(l)(B) claim for benefits is "an action to enforce a trust,"

id... at 1162, which at common law was an equitable action given that "the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993). The remedy for such an action was also equitable; as the Restatement (Second) of Trusts §§ 197-98 (1959) confirms, except in limited circumstances where the trustee has a duty to pay money or to transfer property "immediately and unconditionally" to a beneficiary, the "remedies of a beneficiary against the trustee are exclusively equitable." Accordingly, given the equitable nature of Graham's claim for benefits, Graham has no right to a jury trial on her § 1132(a)(1)(B) action for benefits. That Graham seeks money damages does not alter this conclusion because while it is true that money damages are "the classic form of *legal* relief," "[i]t is also true that money damages were available in those courts [of equity] against the trustee." Mertens, 508 U.S. at 255-56 (emphasis in original).

IV

The district court concluded that Hartford's ultimate denial of disability benefits was predicated on a reasoned basis and supported by substantial evidence because Dr. Silver's independent examination of Graham's medical records was reliable, and Dr. Emel's conclusions did not necessarily contradict Dr. Silver's conclusion. On appeal, Graham argues that her medical records which were generated during the Elimination Period should compel us to conclude Dr. Silver's

report is unreliable. Having considered the entire administrative record, we disagree with this argument and affirm the district court's essential rationale. We conclude Dr. Silver's report is reliable, and that Dr. Emel's conclusions do not definitively, or consistently, reveal that Graham's physical injuries prevented her from performing the essential duties of her Modified Rural Carrier position during the Elimination Period. On the record presented, Hartford had a reasoned basis for ultimately denying Graham disability benefits.

A

"The district court's determination of whether an ERISA benefits decision is arbitrary and capricious is a legal conclusion subject to *de novo* review." Caldwell v. Life Ins Co. of N. Am., 287 F.3d 1276, 1282 (10th Cir 2002). In reviewing a challenge to a denial of benefits under 29 U.S.C. § 1132(a)(1)(8), we apply an "arbitrary and capricious" standard of review to a plan administrator's decision when "the plan grants the administrator discretionary authority to determine eligibility for benefits or to construe the plan's terms." Rekstad v. U.S. Bancorp., 451 F.3d 1114, 1119 (10th Cir. 2006). We apply the arbitrary and capricious standard to Hartford's ultimate denial of disability benefits because the plan conferred upon Hartford "full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Group Insurance Policy," AR. at 113.

Under the arbitrary and capricious standard of review, we will uphold an administrator's decision "so long as it is predicated on a reasoned basis." Adamson v. Unum Life Ins. Co. of Am., 455 F.3d 1209, 1212 (10th Cir. 2006). We will uphold an administrator's decision "unless it is not grounded on *any* reasonable basis." Kimber v. Thiokol Corp., 196 F.3d 1092,1098 (10th Cir. 1999) (citations and quotations omitted; emphasis in original). Certain indicia of an arbitrary and capricious denial of benefits include "lack of substantial evidence, mistake of law, bad faith, and conflict of interest by the fiduciary." Caldwell, 287 F.3d at 1282. Graham points to both a lack of substantial evidence and the fiduciary's conflict of interest as reasons for us to overturn Hartford's denial of benefits.

We define substantial evidence as "such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the decisionmaker. Substantial evidence requires more than a scintilla but less than a preponderance." Sandoval v. Aetna Life & Cas. Ins. Co., 967 F.2d 377,382 (l0th Cir. 1992) (quotations, citations, and alterations omitted). "In determining whether the evidence in support of the administrator's decision is substantial, we must take into account whatever in the record fairly detracts from its weight." Caldwell, 287 F.3d at 1282 (quotations, citations, and alterations omitted).

Hartford's dual role as "both insurer and administrator of the plan" creates "an inherent conflict of interest between its discretion it paying claims and its need to stay financially sound."

Pitman v Blue Cross & Blue Shield of Okla., 217 F.3d 1291, 1296 n.4 (10th Cir. 2000). In such situations, the Supreme Court has instructed that we weigh the conflict of interest "as a factor in determining whether the plan administrator has abused its discretion in denying benefits ...." Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2346 (2008). We have interpreted Glenn to embrace "a 'combination-of-factors method of review' that allows judges to "tak[e] account of several different. often case-specific, factors, reaching a result by weighing all together."' Holcomb v. Unum Life Ins Co of Am., 578 F.3d 1187, 1193 (10th Cir. 2009) (quoting Glenn, 128 S. Ct. at 2351). The importance we attach to the existence of a conflict of interest is proportionate to the likelihood that the conflict affected the benefits decision. See Id.

B

As noted earlier, Graham's entitlement to disability benefits under the NRLCA plan depended upon whether her ankle and knee injuries prevented her from performing the duties of her sedentary position during and beyond the Elimination Period (from July 16, 2000 until October 14,2000). To answer this question, Hartford retained Dr. Silver, a board certified orthopedic surgeon, to independently review Graham's medical records to determine her functional limitations during that time. Dr. Silver reviewed those records, consulted Dr. Emel, and reached the independent conclusion that Graham was capable of performing sedentary work during the Elimination Period because she could "sit for unlimited periods of time" and could

"perform some form of ambulation around her office for approximately 15 to 20 minutes.' A.R. at 174.

Requesting clarification, Hartford asked Dr. Silver if his conclusions and Dr. Emel's conclusions specifically addressed the Elimination Period. Although Dr, Silver was unsure that Dr. Emel "remembered 8 years earlier" because Dr. Emel "did not go back thru the medical records," when Dr. Silver contacted Dr. Emel again, Dr. Emel stated that although Graham was "50 lbs heavier at the time," he "felt the restrictions would probably be the same but did not elaborate" Id. at 162. Hartford also asked Dr. Silver to elaborate upon Graham's ambulatory abilities during the Elimination Period. Dr. Silver responded that "Dr. Emel feels the claimant can sit for 8 hours a day and stand/walk 15-30 minutes 3 to 4 times daily but not on a frequent basis. I concur with Dr. Emel on this," Id. 163. Based on Dr. Silver's independent review of Graham's medical records, his conversations with Dr. Ernel, and the documents contained in Graham's claim file, Hartford ultimately concluded that Graham was capable of performing her sedentary job during the Elimination Period, and thus was not entitled to receive disability benefits.

Graham has framed her appeal on this issue as resting upon a "direct conflict" between her medical records which were generated before, during, and after the Elimination Period and Dr. Silver's independent review and subsequent conversations with Dr. Emel eight years later. Aplt's Br. at 56. As such, Graham argues that the "reliable,

contemporaneous evidence before, during and after" the Elimination Period should compel us to reject Dr, Silver's report as unreliable, and reject Hartford's ultimate denial of benefits as arbitrary and capricious. Id. We disagree. Graham's medical records do not undermine the reliability of Dr. Silver's evaluation, or the reasoned basis for Hartford's denial of benefits. To the contrary, the evidence before, during, and after the Elimination Period does not definitively establish that Graham's physical injuries prevented her from performing the essential duties of her Modified Rural Carrier Position from July 16, 2000 until October 14, 2000.

First, the medical documentation before and during the Elimination Period does not definitively reveal that Graham was totally disabled. No medical records exist for the period between March 21, 2000 (the follow-up evaluation to the cyst removal surgery) and July 17, 2000 (the first day of Graham's leave of absence). This gap in Graham's medical records, especially on the heels of an operation that successfully lessened Graham's ankle pain, makes it difficult to verify that Graham's physical impairments had deteriorated to the point that she had to retire. The medical records during the Elimination Period itself do not definitively reveal that Graham was totally disabled; in fact, the records at the beginning of that time frame suggest some improvement in Graham's condition. Despite the swelling that Graham was experiencing in her ankle and the irritation she was experiencing in her knee during late July 2000, A.R. at 259, 263, Dr. Emel noted on August 10, 2000 that Graham's ankle and knee had both "improved," id. at 264-65. And we

agree with the district court that Dr. Emel's July 26, 2000 recommendation for disability retirement, in which he states that he "really do[es] not think [Graham] will be able to continue her work capacities," is not dispositive. Id. at 262. That statement suggests a potential future incapacitation; it does not indicate that Graham was at that time incapable of performing a sedentary occupation.

Second, Dr. Emel's conclusions immediately following the Elimination Period do not necessarily identify Graham as incapable of performing her Modified Rural Carrier duties. In November and December 2000, Dr. Emel concluded on three separate occasions that Graham was unable to work: on November 10 Graham was "still not ready to return to work yet," id. at 270; on December 5 Graham was "still not in a position where she can work," id. at 272; and on December 12 Graham was "still temporarily totally disabled." Id. at 273. Despite the apparent firmness of these conclusions, they are not specific enough to demonstrate that the onset of Graham's incapacity coincided with the beginning of the Elimination Period. Additionally, it appears that Dr. Emel, while generally aware of Graham's "work limitations of mostly sedentary work," id. at 242, was not fully aware of the precise requirements of Graham's Modified Rural Carrier position. For example, in his July 26, 2000 letter, Dr. Emel acknowledged that Graham had "been on special duty for the last several years," but he indicated that "[a]n ambulatory job would be counterproductive for her." Id. at 262. Given that Graham's Modified Rural Carrier position was

sedentary, and not ambulatory, this misunderstanding casts doubt on Dr. Emel's conclusions during this period.

Third, Dr. Emel's later conclusions are either inconsistent with Graham being totally disabled during the Elimination Period, or are not specific enough to support such a conclusion. The prime example of Dr. Emel's inconsistency is his January 23, 2001 conclusion that Graham's physical conditions did not affect her ability to perform sedentary work, a conclusion that stands in stark contrast to Dr. Emel's previous conclusions, as well the two Physical Capacities Evaluation Forms that he had just completed, both of which indicated that Graham could not endure an eight-hour-a-day sedentary desk job. As the district court noted, although Hartford could not unilaterally rely on this statement to deny benefits, it does support the view that Dr. Emel did not have a strong opinion concerning Graham's sedentary work capabilities at that time.

Graham argues that we should disregard Dr. Emel's January 23,2001 statement because Dr. Emel's later conclusions show how he "recanted, in unequivocal language, this single [January 23,2001] medical record" which did not support Graham's disability. Aplt's Br. at 44-45. We do not find this later disavowal in the administrative record. In fact, Dr. Emel's March 7, 2001 statement that Graham "really should not sit for more than an hour at anyone time," is not necessarily inconsistent with being able to perform a sedentary job. A.R. at 448. And Dr. Emel's later correspondence contains only general

statements which are bereft of any concrete detail that could establish Graham as totally disabled during the Elimination Period. The August 1, 2002 letter, presumably authored by Dr. Emel, concluded that Graham "is really not capable of doing even sedentary work for long periods of time," and insisted that "[t]here is no gainful employment for her to do at the post office." Id. at 275. That letter does not reference the Elimination Period, nor does it detail any evidence demonstrating entitlement under the plan. Dr. Emel's January 28,2004 letter, in which he stated that Graham "has been unemployable in the last 2-3 years at least," suffers from the same lack of specificity. Id. at 277.

Finally, Graham also points to her disability retirement as evidence that she could not perform her sedentary position during the Elimination Period. Although Hartford's denial letter does not explain how it weighed this piece of evidence, we agree with the district court that it was nonetheless reasonable for Hartford to decide that it was not determinative. The administrative record contains only two documents that pertain to Graham' s disability retirement: a letter from the OPM explaining that her application was approved, id. at 557-58, and the front side of a Civil Service Retirement System form entitled "Agency Certification of Reassignment and Accommodation Efforts." Id. at 355.[6] On that form,

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[6] Despite the form's indication that it was "[c]ontinued on reverse," the reverse side was not included in the

the agency checked a box indicating that "the medical evidence presented to the agency shows that accommodation is not possible due to severity of medical condition and the physical requirements of the position." Id. The agency reviewer additionally noted on the form that "Ms. Graham has been given a limited duty job, but is unable to perform the duties of this job due to severity of her disabilities. She is currently on LWOP." Id. Apart from these notations, the form provides no insight into the procedures or methods the agency employed, the standards it applied, or the evidence it reviewed in determining that Graham was eligible for disability retirement. As such, it was reasonable for Hartford to conclude that it was not determinative.[7]

In sum, given the reliability of Dr. Silver's independent review, and the inconclusive nature of Graham's medical records, we conclude that Hartford had a reasoned basis for ultimately denying Graham disability benefits.

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administrative record. A.R. at 355.

[7] Graham also argues, for the first time in her reply brief, that we should consider the opinion of Dr. Jerry D. McKenzie, M.D., another examining physician, who after reviewing Graham's medical records and conducting a physical examination of Graham, opined in 2003 that Graham "has been temporarily, totally disabled since 7-15-00." A.R. at 369. Because "issues raised by an appellant for the first time in a reply brief are generally deemed waived," Wheeler v Comm'r, 521 F.3d 1289, 1291 (10th Cir. 2008), we will not consider this argument.

V

For the reasons stated, we AFFIRM the judgment of the district court.

Case 4:03-cv-00144-CVE-SAJ Document 65

Filed in USDC ND/OK on 10/29/2008

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHIRLEY A. GRAHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	03-CV-0144-CVE-
HARTFORD LIFE & ACCIDENT INSURANCE COMPANY,	)	SAJ
	)	
	)	
Defendant.	)	

OPINION AND ORDER

Now before the Court is Defendant Hartford Life Insurance & Accident Company's Motion for Judgment on the Pleadings and to Strike Jury Demand and Brief in Support (Dkt. # 61). Defendant moves for judgment on the pleadings on plaintiff's state law claims pursuant to Federal Rule of Civil Procedure 12(c). With respect to plaintiff's claim based on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., defendant moves to strike plaintiff's jury demand.

I.

Plaintiff was employed as a rural letter carrier by the United States Postal Service ("USPS") and was also a member of the National Rural Letter Carriers Association ("NRLCA"). Dkt. # 59, at I. The NRCLA is the collective bargaining union for rural letter carriers employed by the USPS. Id. The NRCL provided its members with a long-term disability plan (the "Plan"). Id. at 2. Plaintiff was covered under the disability insurance policy issued by defendant to NRCLA as part of the Plan. Dkt. # 61, at 2. Plaintiff had various medical conditions which required her to first receive a modified work assignment and then receive a disability retirement. Dkt. # 59, at 2.

Plaintiff filed an initial claim for benefits and was denied. Id. On February 27, 2003. plaintiff filed a complaint alleging a state court claim for breach of duty of good faith and fair dealing. Dkt. # 1. On April 22, 2005, Judge Ellison ruled that the Plan is governed by ERISA, thus preempting plaintiffs state court claim. Dkt. # 21. Thereafter, plaintiff "proceeded under ERISA jurisprudence" and on January 20, 2006, the Court remanded plaintiff's claim for benefits to the Plan administrator, Hartford, for a full and fair redetermination of the claim and closed the case. Dkt. # 33. The Court subsequently denied plaintiff's motion for attorney fees. Dkt. # 46.

Plaintiff appealed and the Tenth Circuit held that this Court lacked jurisdiction to consider plaintiff's motion for attorney fees and vacated the denial of her motion. Dkt. # 54. Plaintiff's petition for writ of certiorari was denied by United States

Supreme Court on March 25, 2008. Dkt. # 58. The plan administrator denied plaintiff's remanded claim for benefits on July 24, 2008 and plaintiff filed an amended complaint in this Court on August 4, 2008. Dkt. # 59. On August 5, 2008, this case was reopened. Dkt. # 60.

II.

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is governed by the same standard of review applicable to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Nelson v. State Farm Mut. Auto Ins. Co., 419 F.3d 1117. 1119 (l0th Cir. 2005). In considering a motion to dismiss pursuant to F cd. R. Civ. P. 12(b)(6), a court must determine whether the claimant has stated a claim upon which relief may be granted. A motion to dismiss a complaint for failure to state a claim should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing (Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action," Bell Atlantic Corp. v. Twombly, ____ U.S. ____, 127 S. Ct 1955, 1965 (2007). The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level" Id. (citations omitted). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. Id. at 1969. When deciding whether to grant the well-pleaded

allegations of the complaint as true, even if doubtful in fact, and must construe the allegations in the light most favorable to the claimant. Id. at 1965; Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir 2007): Moffett v. Halliburton Energy Servs., Inc., 291 F.3d 1227, 1231 (10th Cir 2002). Nonetheless, a court need not accept as true those allegations which are conclusory in nature. Erikson v. Pawnee County Bd. of County Comm'rs, 263 F.3d 1151, 1154-55 (10th Cir. 2001) (citations omitted). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." Hall v. Bellmon, 935 F.2d 1106, 1109-10 (l0th Cir. 1991). In sum, the claimant must allege facts sufficient to state a claim for relief that is plausible on its face. Twombly. 127 S. Ct at 1974.

Plaintiff asserts state law claims for "Breach of Insurance Contract" and "Breach of the Obligation of Good Faith and Fair Dealing" and seeks punitive damages on both claims in addition to any other relief to which she may be entitled. Dkt. # 64. Defendant moves for judgment on plaintiff's state law claims pursuant to Fed. R. Civ. P. 12©). Specifically, defendant argues that it is the law of the case that plaintiff's state law claims is preempted by ERISA and, accordingly, plaintiff cannot state a claim upon which relief may be granted. Plaintiff, while recognizing that the issue of preemption has already been decided in this case, nonetheless asserts state law claims "to preserve the right to appeal that portion of this case." Dkt # 64.

The ERISA preemption clause provides that ERISA supercedes all state laws insofar as they relate to any employee benefit plan. See 29 U.S.C. § 1144(a). Judge Ellison, in an Order filed on April 22, 2005, ruled that each of plaintiffs state law claims is preempted by ERISA, Dkt. # 21. Judge Ellison further held that the Plan "does not meet the criteria to be a government plan, and therefore, be excluded from ERISA constraints." Id. (citing 29 U.S.C. § 1003(b)(1)). Accordingly, Judge Ellison ruled that the "civil enforcement provisions of ERISA § 1132(a) were intended to be the exclusive vehicle for actions by ERISA plan participants. . . and Graham is restricted to that enforcement vehicle." Id. at 6.

As a general rule, once an issue is decided, it will not be relitigated in the same case. See Wessel v. City of Albuquerque, 463 F. 3d 1138, 1143 (10th Cir. 2006), District courts are to apply the doctrine of law of the case "unless one of the exceptions specifically and unquestionably applies," Id. (internal quotation marks and citation omitted). These exceptions include: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice," Id. (internal quotation marks and citation omitted). As none of the exceptions apply here, there is no reason to revisit this issue at this time. The Court finds that Judge Ellison's Order stands and defendant is entitled to judgment on plaintiff's state law claims.

With respect to plaintiff's request for punitive damages, because plaintiff's state law claims are preempted, the only potential for recovery is based on her ERISA claim. The Tenth Circuit has made clear that extra-contractual damages are not recoverable under ERISA. Zimmerman v. Sloss Equipment, Inc., 72 F. 3d 822, 827-29 (10th Cir. 1995); see also Moffett v. Halliburton Energy Services, Inc., 291 F.3d 1227,1234-35 (10th Cir. 2002). Accordingly, plaintiff's not entitled to punitive damages or any other relief other than what is provided for under ERISA, and defendant is entitled to judgment on plaintiffs claim for punitive damages.

III.

In addition to her state law claims, plaintiff asserts a claim under ERISA and requests a jury trial. Defendant moves to strike that request; plaintiff argues that this action is a dispute for monetary damages under the terms of a contract. Dkt. # 59. Although ERISA does not specifically state whether a jury should be utilized to decide claims for relief, see Zimmerman, 72 F.3d at 829, it is well-settled in the Tenth Circuit that ERISA provides equitable relief only, and therefore plaintiff does not have the right to a jury trial on her ERISA claim. Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156, 1158-59 (10th Cir. 1998) (holding that the relief granted by ERISA is equitable in nature and that plaintiffs are not entitled to a jury trial on ERISA claims); see also Thomas v. Oregon Fruit Products Co., 228 F.3d 991,996-97 (9th Cir. 2000) (collecting citations discussing equitable nature of relief in ERISA cases).

Nonetheless, plaintiff relies on Great-West & Annuity Insurance Company v. Knudson, 534 U.S. 204 (2002), to attempt to circumvent the well-established rule that a jury trial is not available for an ERISA claim. In Great West, an insurer attempted to file a subrogation action against its beneficiaries under 29 U.S.C. § 1132(a)(3). The Supreme Court held that the specific type of restitution requested by the insurance company was based purely on contract, and therefore the nature of the relief sought was legal. Since the insurer was seeking a legal remedy, the Supreme Court held that ERISA did not provide the insurer a cause of action. Id. at 221. There was no issue in Great West as to whether 29 U.S.C. § 1132(a)(1)(B) authorizes a jury trial in an ERISA case.

Tenth Circuit precedent does not support plaintiff's request for a jury trial, and other circuit court that have considered the issue have found that § 11 32(a)(l)(B} does not provide a plaintiff the right to a jury trial. Adams, 149 F.3d 1156; Sullivan v. LTV Aerospace & Defense Co., 82 F.3d 125l, 1257-59 (2d Cir. 1996); Cox v. Keystone Carbon Co., 861 F.2d 390, 394 (3d Cir. 1988); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir, 1985); In re Vorpahl, 695 F.2d 318, 320-21 (6th Cir. 1982); Calamia v Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980); Wardle v Central States, Southeast and Southwest Areas Pension, 627 P.2d 820, 829 (7th Cir. 1980). Great West does not change this result, as that decision concerned the insurance company's right to bring a subrogation claim for relief under a contract theory, not the statutory relief sought by an individual beneficiary under an ERISA plan. The

relief plaintiff seeks is equitable in nature and plaintiff has no Seventh Amendment right to a jury trial on her ERISA claim.

IT IS THEREFORE ORDERED that Defendant Hartford Life Insurance & Accident Company's Motion for Judgment on the Pleadings and to Strike Jury Demand and Brief in Support (Dkt # 61) is **granted**. Partial judgment on plaintiffs state law claims (counts 1 and 2) and her claim for punitive damages is granted in favor of defendant and against plaintiff and the jury demand is stricken.

IT IS FURTHER ORDERED that a separate ERISA scheduling order is entered herewith.

DATED this 29th day of October, 2008.

/s/ Claire V. Eagan
CLAIRE V. EAGAN, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

Case 4:03-cv-00144-CVE-SAJ Document 80
Filed in USDC ND/OK on 03/13/2009

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHIRLEY A. GRAHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 03-CV-0144-CVE-SAJ
	)	
HARTFORD LIFE & ACCIDENT INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

OPINION AND ORDER

Plaintiff Shirley Graham filed the instant civil action seeking to recover benefits and enforce her rights under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101 et seq. (ERISA). Plaintiff challenges as arbitrary and capricious the decision of Hartford Life & Accident Insurance Company to deny her long-term disability (LTD) benefits.

I.

Plaintiff was employed by the United States Postal Service (USPS) from November 1976 to July 2000. From November 1976 until June 4,1997, Graham was a rural letter carrier. On June 4, 1997, the USPS offered her a position as a Modified Rural

Carrier, a sedentary job designed specifically to accommodate her physical condition. Administrative Record (Admin. Rec.) at Hart2-Grahm 196 (subsequent references omit the Bates-stamp prefix). Plaintiff was a member of the National Rural Letter Carrier's Association (NRLCA), the official bargaining representative for rural letter carriers employed by the USPS. The NRLCA, in order to provide benefits to members, obtained a group long-term disability policy from Hartford (the Policy). Plaintiff became a participant in the NRCLA Group Benefits Plan (the Plan), which was funded by the Policy. Id. at 566. The Plan is governed by ERISA. Dkt. # 21.

According to the Policy, benefits are payable if:

(1) you become Totally Disabled while insured under this plan;

(2) you are Totally Disabled throughout the Elimination Period;[1]

(3) you remain Totally Disabled beyond the Elimination Period;

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[1]Under the Plan, the Elimination Period is defined as "the period of time you must be Totally Disabled before benefits become payable." Admin. Rec. at 102. The Elimination Period may be satisfied by one of the following: "Option 1: the first 60 consecutive day(s) of any one period of Total Disability . . . or Option 2: the first 90 consecutive day(s) of anyone period of Total Disability." Id. In this case, the parties do not dispute that Graham's Elimination Period started on July 16 2000 and lasted until October 14, 2000. See Dkt. ## 76, at 15; 77, at 10.

(4) you are, and have been during the Elimination Period, under the Regular Care of a Physician; and
(5) you submit proof of loss satisfactory to The Hartford.

Admin. Rec. at 428. Total Disability under the Plan means that:

1. during the Elimination Period; and
2. for the next 24 month(s), you are prevented by:
    a) accidental bodily injury;
    b) sickness;
    c) mental illness;
    d) substance abuse: or
    e) pregnancy,

from performing the Essential Duties of Your Occupation, and as a result you are earning less than 20% of your Pre-disability Earnings ...." Id. at 116.

The Policy contains several provisions granting Hartford the discretionary authority to interpret the Policy language and determine eligibility. Id. at 432 ("The Hartford reserves the right to determine if your proof of loss is satisfactory."). See also id. at 433 ("The Hartford has full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Group insurance Policy.").

A. Plaintiff's Medical History

Plaintiff attributes her underlying injury to an on-the-job accident that occurred on February 7, 1994, when she twisted her right knee while trying to get away from a dog.[2] Graham reported that she re-injured her knee on March 8, 1994. Id.. at Graham received treatment for her injuries from Dr. T. Jeffrey Emel, M.D., and Dr. Bradford L. Boone, M.D., both of the Eastern Oklahoma Orthopedic Center. Id.. at 221. Since her initial injury, plaintiff has experienced multiple complications with her knees and ankles. On July 11, 1994, Graham underwent an arthroscopy and a partial synovectomy of her knee. Graham's symptoms persisted post-surgery, and on March 4, 1997, she underwent a diagnostic arthroscopy, which indicated loss of joint surface "consistent with early mild to moderate medial compartment and patellofemoral arthrosis" Id. at 227. On April 18, 1997, an unsigned medical report from the Eastern Oklahoma Orthopedic Center states that Graham was "safe to return to office sedentary work endeavors."[3] id. at 226.

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[2] The denial letter from Hartford details of her injuries and medical conditions beginning in 1990. Id. at 1- 9. These conditions include plantar fasciitis in 1990, and a meniscal injury in 1993. Id. at 3.

[3] Shortly thereafter, on June 4, 1997, plaintiff was accommodated with the sedentary position of Modified Rural Carrier. Id. at 196

On October 25, 1998, Graham reported that she stepped off of a chair and twisted her left foot and ankle. Id. at 229. Graham returned to Dr. Emel for treatment and was diagnosed with a Grade 1 + deltoid sprain with lateral ankle sprain. Id. at 230. By November 25, 1998, Dr. Emel reported that Graham's ankle had improved. Id. at 232.

On March 31, 1999, Dr. Emel's progress notes state that Graham's knee was "still symptomatic" and she would not be able to "change jobs or do any prolonged standing." Id. at 233. On May 14, 1999, Graham received an injection of Kenalog, Decadron, and Marcaine in her knee. Id. at 234. On August 9, 1999, Graham returned to the Eastern Oklahoma Orthopedic Center complaining of pain in her left ankle. Id. at 235. She was given an ankle brace, anti-inflammatory medication, and a recommendation for physical therapy. Id. On September 2, 1999, Dr. Emel stated that Graham was "improved," Id. at 236. On November 16, November 30, December 7, and December 14, 1999, Graham was given injections of corticosteroids and Synvisc in her right knee. Id. at 238-40. On January 11, 2000, Dr. Emel reported that Graham had "no swelling and the knee pain is significantly decreased," Id. at 242. However, Dr. Emel noted that Graham was having pain in her left ankle and ordered an MRI. Id. at 243. He also stated that she was "still continuing on her present work limitations of mostly sedentary work," Id. at 242.

On January 13,2000, Graham had an MRI of her ankle, which revealed the presence of a

ganglion cyst. Id. at 244. Graham went for a consultation on February 1,2000 with Alan G. Lewis, M.D., who told her that surgical removal of the ganglion cyst might not relieve her ankle pain, but an excisional biopsy could be performed. Id. at 249. Despite her condition, Dr. Lewis stated that from his perspective, Graham was fit to continue working until the surgery, and would be able to return to work several weeks after the procedure. Id.

Graham underwent surgery on her ankle on February 23. 2000. Id. at 253-54. On March 2, 2000, Graham returned to Dr. Lewis and was told that she should start on a rehabilitative exercise program. Id. at 258. Dr. Lewis' March 21, 2000 report states that Graham was "overall doing significantly better in terms of her former discomfort." Id. at 260.

The record does not include any medical reports for the time period between March 21, 2000[4] and July 28, 2000[5]. However, July 15,2000 was Graham's last day of work at the USPS. Plaintiff alleges that her condition deteriorated due to the development of osteoarthritis in both knees and both ankles, forcing her to stop working. Dr. Emel's

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[4] It is unclear what happened in that time period to cause Graham' s deterioration to the point where she could no longer work.

[5] July 15,2000 was the last day Graham worked at the USPS; July 17, 2000 was the first day of Graham's leave of absence. Id. at 566.

progress notes from July 28, 2000 reflect that Graham had swelling in her ankle, and he reported giving her an injection of Celestone. Id. at 263. On August 10, 2000, Dr. Emel noted that Graham's ankle and knee were both "improved." Id. at 264-65. Graham received another series of Synvisc injections in her knee on August 30, September 7, and September 15, 2000. Id. 266-68. On October 13.2000, Dr. Emel noted that Graham was "only minimally improved." Id. at 269. Approximately one month later. on November 10, 2000, Dr. Emel reported that Graham's condition was the same as it was in October, and she continued to have knee pain despite the Synvisc injections. Id. at 270. He stated that "she [was] still not ready to return to work yet." Id. On November 15, 2000, Dr. Emel noted that Graham's knee and ankle were "acting up," but the "joint actually looks pretty good." Id. 271. During the November 15, 2000 visit, Dr. Emel gave Graham an injection of Celestone and Decadaron in her left ankle. Id. On December 5, 2000, Dr. Emel reported that Graham got relief from knee pain, but continued to have ankle pain and was "still not in a position where she can work." Id. at 272. On December 12, 2000, Dr. Emel stated that Graham's right knee was still problematic, but it "calmed down" enough to forego an injection Id..at 273. Nonetheless, Dr. Emel concluded that Graham was "still temporarily totally disabled." Id.

B. Graham's Claims for Benefits

When Graham stopped working on July 15, 2000, she was working as a Modified Rural Carrier. The Modified Rural Carrier position is described as

follows: "General clerical \work for Maintenance Department. Simple filing, answering phones, occasional simple computer use, completion of reports, and other duties as assigned within documented restrictions." Id. at 450, In addition, the job had the following physical requirements: "2 hours each intermittent walk/stand, 1 hour intermittent lift up to 10 lbs. No climb, kneel, twist. Minimal intermittent bend/squat. No push/pull. Sedentary work." Id. at 450, Graham described her job duties for the time she worked in her modified position as being "limited to office work." Id. at 577. Hartford determined that, at the time Graham stopped working, she had been employed as a Modified Rural Carrier for more than six months and, accordingly, it would be considered her occupation for the purpose of determining eligibility for LTD benefits. Id. at 1.

On July 25, 2000, Graham applied for disability retirement. Id. at 575. In a July 26, 2000 letter from Dr. Emel to the United States Department of Labor, he reported that "Mrs. Graham has significant osteoarthritis involving both knees and both ankles. Id. at 261-62. An ambulatory job would be counterproductive for her. ... I really do not think she will be able to continue her work capacities and recommend that you consider her for Disability retirement" Id. On December I, 2000, the United States Office of Personnel Management notified plaintiff that she had been approved for disability retirement. Id. at 557-58.

Plaintiff filed an application for LTD benefits on October 27, 2000. Id. at 577-79. Upon receipt of

plaintiff's application, Hartford assigned a claims specialist who reviewed submitted documents, interviewed Graham, and solicited additional materials from plaintiff, Dr. Emel, and her employer. Dr. Emel was asked to complete a Physical Capabilities Evaluation Form. On the form, which was completed on December 15, 2000, Dr. Ernel indicated that Graham w as capable of sitting for two hours and driving for one hour, for a total of three hours of work per day. Id. at 531. On December 19, 2000, Twila Nolan, a Human Resources Specialist for the USPS, completed a Physical Demands Analysis Form, and concluded that Graham was capable of sitting for eight hours and intermittently standing or walking with rest. Id. at 537. On December 28, 2000, Dr. Emel completed another Physical Capabilities Evaluation Form, and concluded that Graham was capable of sitting for one hour at a time, for a total of four hours per work day. Id. at 514.

The Hartford claims specialist contacted Dr. Emel to have him clarify whether plaintiff's condition affected her ability to sit and perform a sedentary job, On January 23, 2001, Dr. Emel responded "no, it does not but [the patient] has retired." Id. at. 479-80. Based on this information, Hartford denied Graham's claim in a letter dated February 28, 2001. Id. 16-19. Plaintiff appealed the denial through the administrative appeal process. Id. at 447. As part of the appeal, Hartford again contacted Dr. Emel, who opined that Graham could not sit for more than one hour at a time. Id. at 448. Hartford denied her appeal on August 3, 2001, stating that the Modified Rural Carrier position

allowed her to move around as needed and, accordingly, Graham's physical restrictions would not prevent her from performing the essential requirements of her occupation. Id. at 442-44. On September 26, 2001, Graham appealed again, reiterating her belief that Hartford failed to consider all of the facts in support of her claim, and claiming that her severe pain and trouble sleeping contributed to her inability to work. Id. at 439-40. Hartford again denied her appeal, finding that Graham provided no medical evidence of a sleep disorder and that none of the medical records with respect to her knees and ankles documented the severity of her pain. Id. at 388-90. Finally, Graham appealed on February 21, 2003, and that appeal was denied on the grounds that the record was closed and the appeals process exhausted, at 350.

On February 27, 2003, plaintiff filed a complaint alleging a state law claim for breach of duty of good faith and fair dealing. Dkt. # 1. On April 22, 2005, another judge of this Court ruled that the Plan is governed by ERISA, thus preempting plaintiffs stale law claim, Dkt. # 21. Thereafter, plaintiff "proceeded under ERISA jurisprudence" and on January 20, 2006, this Court remanded plaintiffs claim for benefits 10 Hartford for a full and fair redetermination of the claim and closed the case, Dkt. # 33.

On remand, Hartford retained Steven A Silver, M.D. a board-certified orthopedic surgeon, to examine Graham's medical records, Admin, Rec, at 170-74. Specifically, Dr. Silver was asked to "define the functional limitations for the period of 7/16/00

through and beyond 10/14/00 [the Elimination Period] and at what level." Id. at 170. Dr. Silver reviewed Graham's medical records and spoke with Dr. Emel regarding Graham's condition, Id. On July 3, 2000, Dr. Emel reportedly told Dr. Silver that Graham was able to "sit for an unlimited period of time, but can stand for no more (than approximately 15 minutes and walk for no more than 15 minutes. He feels (that she can lift no more than 10 lbs, due to a problem with respect to her back" Id. Thereafter, Dr. Silver provided Hartford with a report in which he opined as follows:

> It is my opinion that based on the information provided that Shirley Graham is capable of sedentary level activity from 7-16-00 to 10-14-00 where she can sit for unlimited periods of time and lift up to 10 lbs. It is my opinion that she can perform some form of ambulation around her office for approximately 15 to 20 minutes as noted by Dr. Emel. She can engaged in fine manipulation with respect to her hands. In summary, it is my opinion that both the information provided as well as conversation with Dr. Erne! bear out this woman having a capacity for sedentary work from 7-16-00 to 10-14-00 and beyond.

Id. at 174.

Hartford contacted Dr. Silver and asked him to clarify several items in his report. Id. at 159-60.

Dr. Silver was asked whether he had advised Dr. Ernel that Hartford was "looking specifically at the period 7/16/00 through 10/14/00 and beyond" Id. Dr. Silver was also asked to clarify whether Dr. Emel understood the relevant time period with respect to whether Graham could sit most of the time in an eight hour day. Id. According to Dr. Silver, he called Dr. Emel for clarification on July 2008, and, with respect to both questions, Dr. Emel stated that Graham was "50 lbs. heavier at that time," but "the restrictions would probably be the same." Id. at 162. Hartford also requested clarification on whether Dr. Emel conveyed that Graham could stand and walk 15 minutes total in an eight hour day or whether she could stand and walk 15 minutes at a time in the course of an eight hour day. Id. Silver responded that "Dr. Emel feels the claimant can sit for 8 hours a day and stand/walk 15-30 minutes 3 to 4 times daily but not an [sic] a frequent basis." Id.

Hartford denied plaintiffs remanded claim for benefits on July 24, 2008. Id. at 1-9. In its denial letter, Hartford stated that it reviewed all of the evidence and determined that Graham was "functionally capable of performing the duties of her sedentary occupation" for the Elimination Period of July 16, 2000 through October 14,2000. Id. Plaintiff filed an amended complaint in this Court on August 4, 2008 (Dkt. # 59).

II.

A. Standard of Review

Plan beneficiaries, like plaintiff, have the right to federal court review ofbenefit denials and terminations under ERISA. "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans:" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989). Specifically, 29 U.S.C. § 1132(a)(1)(B) grants plaintiff the right "to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan." The default standard of review is de novo. However, when a plan gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of a plan, a challenge under § 1132(a)(1)(B) is to be reviewed under an arbitrary and capricious standard, See Firestone, 489 U.S. at 115 (applying a deferential standard of review when the plan administrator or fiduciary has discretionary authority to determine eligibility for benefits or to construe the terms of a plan). It is clear in this case that Hartford had the authority to determine eligibility for benefits and to construe the terms of the Plan. See Admin, Rec, at 105, 112-13 ,432-33. Accordingly, Hartford's decision will be reviewed using the arbitrary and capricious standard,

Under the "pure" version ofIhe arbitrary and capricious standard, a plan administrator's or

fiduciary's decision will be upheld "so long as it is predicated on a reasoned basis." Adamson v. Unum Life Ins. Co. of Am., 455 F.3d 1209, 1212 (10th Cir. 2006). That basis "need not be the only logical one nor even the best one." Nance v Sun Life Assur. Co. of Can., 294 F.3d1263, 1269 (10th Cir. 2002) (quoting Kimber v. Thiokol Corp., 196 F.3d 1092, 1098 (10th Cir. 1999)). The decision merely must "reside[] 'somewhere on a continuum of reasonableness-even if on the low end.'" Adamson, 455 F.3d at 1212 (quoting Kimber, 196 F.3d at 1098). A plan's deeision will not be set aside "if it was based on a reasonable interpretation of the plan's terms and was made in good faith." Trujillo v. Cyprus Amax Minerals Co. Ret. Plan Comm., 203 F.3d 733, 736 (l0th Cir. 2000).

In contrast, "[i]ndicia of arbitrary and capricious decisions include lack of substantial evidence, mistake of law, bad faith, and conflict orinterest by a fiduciary," Caldwell v. Life Ins. Co. of N. Am., 287 F.3d 1276, 1282 (10th Cir. 2002). The Tenth Circuit has held that "[s]ubstantial evidence is such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the [decisionmaker]. Substantial evidence requ.ires "more than a scintilla but less than a preponderance," Sandoval v. Aetna Life & Cas. Inc. Co., 967 F.2d 377, 382 (10th Cir. 1992) (citation omitted). In reviewing the plan administrator's or fiduciary's decision, the reviewing court generally is "limited to the administrative record-the materials compiled by the [decisionmaker] in the course of making [the] decision," Hall v. Unum Lire Ins. Co. of Am, 300 P.3d

1197, 1201 (10th Cir. 2002) (citation omitted). The reviewing court should give less deference to a decision if the plan administrator or fiduciary fails to gather or to examine relevant evidence. Caldwell, 287 P.3d at 1282.

B. Conflict of Interest and Glenn

If an ERISA fiduciary both decides eligibility and pays benefits claims out of its own pocket, a conflict of interest arises. Fought v. Unum Life Ins Co. of Am., 379 P.3d 997, 1005 (10th Cir. 2004); see also Pitman v. Blue Cross Blue Shield of Okla., 217 F.3d 1291, 1296 n. 4 (10th Cir. 2000) ("[I]n Blue Cross' situation, as both insurer and administrator of the plan. there is an inherent conflict of interest between its discretion in paying claims and its need to stay financially sound."). Under the "sliding scale" approach crafted by the Tenth Circuit, "the reviewing court will always apply an arbitrary and capricious standard, but the court must decrease the level of deference given" to benefits decision "in proportion to the seriousness of the conflict." Fought, 379 F3d at 1004. The claimant has the burden of proving that "the plan administrator's dual role jeopardized his impartiality." Id. at 1005 (citation omitted). Where there is an inherent conflict of interest, Fought requires a district court to shift the burden to the plan administrator to prove that its decision is supported by substantial evidence. Id. at 1006. However, the United States Supreme Court in Metronolitan Life Ins, Co. v. Glenn, 128 S. Ct 2343 (2008), held that an employer's or insurer's dual-role conflict is simply "a factor in determining whether the plan

administrator has abused its discretion in denying benefits; . . . the significance of the factor will depend upon the circumstances of the particular case." Id. at 2346.

It is undisputed that Hartford has an inherent conflict of interest as both the payor and claims administrator of the Plan. Plaintiff argues that .Glenn "significantly changes the way tbe Court should review denial of benefits under ERISA jurisprudence." Dkt. # 76, at 18. However, the Supreme Court was clear that it was not altering the standard of review from deferential to de novo in cases involving an inherent conflict of interest. Glenn, 128 S.Ct. at 2350. Rather, Glenn strongly suggests that the key inquiry for a court is whether an insurer's conflict of interest resulted in a biased decision on the plaintiff's benefits claim. Id. at 2350-51. In this respect, Glenn is consistent with prior Tenth Circuit precedent. See Fought, 379 F.3d at 1005. ("Evidence of a conflict of interest requires proof that the plan administrator's dual role jeopardized his impartiality."). The Tenth Circuit has suggested that Glenn does not overrule any previous decisions by the Tenth Circuit, because the existence of a conflict of interest was always a factor when detetmining the level of deference. See Weber v. GE Group Life Assurance Co., 541 F.3d 1002, 1010-11 (10th Cir. 2008). However, Weber acknowledged a "dial back" of deference in cases such as this one, when the plan administrator and insurer have an inherent conflict of interest. Id. at 1010. The court in Weber stated that it would "still employ the arbitrary and capricious standard, but [would] weigh [the plan administrator's] conflict as

a factor in determining the lawfulness of the benefits denial" Weber, 541 F.3d at 1011. Under Fought, when a plan administrator and insurer operate under an inherent conflict of interest:

> the plan administrator must demonstrate that its interpretation of the terms of the plan is reasonable and that its application of those terms to the claimant is supported by substantial evidence. The district court must take a hard look at the evidence and arguments presented to the plan administrator to ensure that the decision was a reasoned application of the terms of the plan to the particular case, untainted by the conflict of interest.

Fought, 379 F.3d at 1006. This type of automatic burden-shifting is inconsistent with Glenn's directive to consider an inherent conflict as simply a factor in the Court's analysis,[6] In Weber, GE Group Life Assurance Company was the plan administrator and insurer, and the Tenth Circuit did not shift the burden to the plan administrator to establish the

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[6] In fact, the Glenn Court specifically stated: "Neither do we believe it necessary or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict. In principle, as we have said, conflicts are but one factor among many that a reviewing judge must take into account." 128 S.Ct. at 2351.

reasonableness of its decision. The Tenth Circuit identified the plan administrator's inherent conflict of interest as a factor, but it did not specify how much the level of deference should be reduced. Weber, 541 F.3d at 1011. Thus, in order to comply with Glenn and ensure consistency with prior, binding Tenth Circuit precedent, the Court will deem Hartford's inherent conflict of interest a factor in its decision and consider the other factors identified by the parties to determine by how much the Court's deference to Hartford's determination should be reduced.

While the Court must not ignore Hartford's dual~role conflict, the fact that Hartford has a financial interest in the outcome does not automatically create an inference that Hartford is biased. See Finley v Hewlett Packard Co. Employee Benefits Org. Income Protection Plan, 379 F.3d 1168, 1176 (10th Clr. 2004) (refusing to infer that a general motivation to deny claims for the purpose of saving money suggests that an inherently conflicted plan administrator was biased). The Court will consider Hartford's inherent conflict of interest as a factor and "dial back" any deference. However, the Court will not shift the burden to Hartford to prove the reasonableness of its decision based only an inherent conflict of interest. Graham has presented no evidence that Hartford's inherent conflict of interest resulted in a biased decision, nor does anything in the Administrative Record reflect any evidence of bias. Although Graham may dispute Hartford's decision to deny her claim. this alone does not show that Hartford acted in a biased manner or that

Hartford's dual-role conflict of interest tainted its decision. In this Court's previous Opinion and Order, the Court held that defendant failed to establish by substantial evidence that its denial of benefits was reasonable. Dkt. # 33 at 7. However, in light of the Supreme Court's holding inGlenn and subsequent Tenth Circuit precedent, the Court will not shift the burden to defendant and instead will determine whether the denial of benefits was "arbitrary and capricious."

III.

Graham contends that Hartford's decision to deny her LTD benefits was arbitrary and capricious.[7] Graham argues generally that her case is stronger now after remand because of new evidence in record.[8] Graham offers numerous reasons why Hartford's denial was not supported by even a scintilla of evidence, including: Hartford gave undue weight to evidence favoring denial: Hartford improperly based its denial ofbenefits on the fact

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[7] Graham submits that Glenn has changed the standard of review in ERISA cases, but even if the Court uses the arbitrary and capricious standard, plaintiff is still entitled to benefits. As discussed above, the denial of benefits will be reviewed under the arbitrary and capricious standard.

[8] The new evidence in the record consists of Dr. Emel's letter dated August 1, 2002 (Admin. Rec. At 354), the Agency Certification form (id. at 355), and Dr. Silver's report (id. at 170-74). Plaintiff argues that the letter and the form strongly weigh in favor of a grant of LTD benefits.

that Graham received an accommodation at work; the treating physician's opinions should have been controlling; and Hartford should have given more weight to the Civil Service Administration's grant of disability retirement. In contrast, Hartford argues that its decision denying LTD benefits is supported by substantial evidence in the record, and was not arbitrary or capricious.

A. Undue Weight to Evidence Favoring Denial

Plaintiff renews her argument that Hartford gave undue weight to Dr. Emel's January 23, 2001 statement to the exclusion of the other medical evidence in the record. Hartford argues that it gathered all available medical evidence and other information related to Graham's claim, and based on all of the evidence, determined that Graham was "not prevented by injury, illness or disease from performing the essential duties of her own occupation," Dkt. # 77, at 15. The Court previously agreed with plaintiff that Hartford's decision gave undue weight to one statement from Graham's treating physician to the exclusion of other evidence in the record. However, after remand for a full and fair determination of Graham's claim, the Court finds that Hartford weighed all available evidence in reaching its decision. In its initial four-page denial letter, the plan administrator relied heavily on Dr. Emel's January 23,2001 statement, and did not clearly indicate that it reviewed all of Graham's medical records. In contrast, Hartford's post-remand. nine-page denial letter includes a recitation of all of the evidence reviewed, and does not explicitly base its denial on anyone

statement to the exclusion ofother medical evidence in the record. Accordingly, defendant did not give undue weight to evidence favoring denial.

B. Graham's Accommodation at Work

Graham also renews her argument that Hartford denied her claims because she received an accommodation at work. Hartford contends that Graham's accommodation was not the basis for the denial. Rather, Hartford considered Graham's sedentary position at the time she filed her claim in determining whether she would be able to perform the essential requirements of her occupation. At the time Graham stopped working, she had been performing her modified job for over three years; accordingly, Hartford determined that Graham's occupation was "Modified Rural Carrier." Because Hartford had the discretion to interpret the terms and conditions of the Policy, it was entitled to determine that Graham's occupation was the one she had been in for more than six months before she stopped working. See Admin. Rec. at 1. Thus, it is clear from the record that Graham's accommodation was relevant to the extent that it determined her occupation at the time she stopped working; there is nothing to suggest that Hartford used her accommodation as part of its decision to deny benefits.

C. Medical Opinions

Plaintiff argues that Dr. Emel clearly opined that Graham was disabled, and Hartford arbitrarily refused to credit his opinion as reliable evidence supporting an award of benefits. Dkt # 76, at 14. Hartford argues that while it considered Dr. Emel's opinions, it was not required to "accord special deference to the opinions of treating physicians," Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003). Further, a non-treating physician's opinion may be treated as reliable evidence, despite conflicting with a treating physician's assessment. Gannon v. Metropolitan Life Ins. Co., 360 F.3d 211, 214 (1st Cir, 2004).

To reach its decision, Hartford gathered evidence concerning Graham's medical conditions and obtained the opinions of her treating physician, Dr. Emel, and Dr. Silver, a board-certified orthopedic surgeon. Dr. Silver reviewed Graham's file and consulted with Dr. Emel. At the conclusion of his investigation, Dr. Silver wrote a thorough report in which he summarized Graham's medical records and concluded that, in his professional opinion, Graham was capable of sedentary work during the Elimination Period. Although Dr. Silver's report favored denial of benefits, Hartford nonetheless asked him to have an additional conversation with Dr. Emel to clarify several points. Specifically, Hartford was concerned that Dr. Emel did not understand that Dr. Silver had asked him to opine on Graham's condition during the Elimination Period. After an additional conversation with Dr. Emel. Dr. Silver reported that Dr. Emel stated that

the work restrictions for Graham would be "the same."[9] The record shows that Dr. Silver reached his opinion on the basis of the available medical evidence. and Graham points to nothing in the record indicating that Dr. Silver's opinion was unreliable. Under the circumstances here, it was reasonable for Hartford to credit Dr. Silver's review of the medical records. See Davis v. Unum Life Ins. Co. of Am., 444 F.3d 569, 577 (7th Cir. 2006) (noting that it is common and reasonable for doctors to review medical records and reach a professional opinion on the basis of a paper review). Because Hartford may rely on the opinion of a non-treating physician, even if it conflicts with the treating physician's assessment, the Court finds that Hartford reasonably relied on Dr. Silver's report when reaching its decision.

Indeed, Hartford's reliance on Dr. Silver's report was all the more reasonable given that it is not entirely clear that Dr. Silver's and Dr. Emel's opinions conflict. A thorough review of Dr. Emel's

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[9] Plaintiff argues, and the Court agrees, that this statement fails to clarify Dr. Emel's position with respect to Graham's condition during the Elimination Period. Accordingly, Hartford should not have relied on Dr. Emel's 2008 statements to the extent that they were unclear. Plaintiff further argues that Dr. Silver's representation of Dr. Emel's 2008 statements is not as reliable as Dr. Emel's contemporaneous opinions as reflected in his records and letters. However, as discussed below, Dr. Emel's medical opinions are reasonably subject to interpretation. The Court finds that Hartford did not give undue weight to Dr. Silver's report of Dr. Emel's opinion, but rather reviewed all of the medical records available.

reports and letters shows that his conclusions are reasonably open to interpretation. First, it does not appear that Dr. Emel was fully aware of the physical requirements of Graham' s modified position when he concluded that Graham was unable to work.[10] For example, on March 31, 1999, Dr. Emel wrote a letter to the United States Department of Labor stating that Graham would be unable to return to her position as a rural carrier because she could not "tolerate sorting her mail" Admin. Rec. at 233. In another letter to the Department of Labor, dated July 26, 2000. Dr. Emel recognized that Graham was working in a "special duty" position, but nonetheless stated that an "ambulatory job would be counterproductive" for her. Id. at 261-62. By the time these letters were written, Graham had heen working in a modified position that did not require her to sort her mail or perform an ambulatory job.

Further, plaintiff relies on Dr. Emel's July 26, 2000, letter for his statement that he "really does not think [Graham] will be able to continue her work capacities." Id. at 262. However, Dr. Emel's statement is not as strong as plaintiff argues. In tbe letter, Dr. Emel seems to suggest that Graham will not be capable of continuing to work. He does not state that, at the time the letter was written, that

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[10] The Court also notes that Dr. Emel's progress notes during the Elimination Period vary between concluding that Graham was showing improvement and noting that her condition was unchanged. Nonetheless, Dr. Emel concluded in his letters that Graham was "temporarily totally disabled."

Graham was currently incapacitated or in such severe pain that she was totally incapable of performing a sedentary job. In addition, although the Court previously held that Hartford gave undue weight to Dr. Emel's January 23, 2001 statement that Graham's condition would not prevent her from sitting, the statement need not be completely ignored on remand. When considered along with other evidence in the record, this statement suggests that Dr. Emel did not have a strong position with regard to whether Graham could perform sedentary work. While it is not determinative in and of itself, the January 2001 statement favors Hartford's decision to deny LTD benefits.

Finally, plaintiff relies heavily on Dr. Emel's August 1, 2002 letter, and argues that he unequivocally concluded that Graham was disabled and entitled to benefits. Id. at 354. However, the letter does not specifically reference the Elimination Period, nor does Dr. Emel explain the basis for his opinion. In the letter, Dr. Emel concludes that "there is no gainful employment for [Graham] to do at the post office." Id. However, he does not explain her physical limitations in terms of the number of hours Graham was capable of sitting, walking, or standing. Accordingly, Dr. Emel's August 2002 letter, when read in conjunction with other evidence in the record, is not determinative. Thus, Hartford was not arbitrary or capricious in failing to give this letter significant weight in reaching a decision.

In sum, it was reasonable tor Hartford to rely on Dr. Silver's opinion lhat Graham was capable of performing the essential requirements of her sedentary job during the Elimination Pedod, even if that opinion was in conflict with the treating physician's opinion. In facl, it is not entirely clear that Dr. Emel ever conclusively opined that Graham was specifically incapable of performing the essential duties of her sedentary occupation. Therefore, Dr. Silver's opinion does not necessarily conflict with that of plaintiffs treating physician. In any event, a review of the record shows that the evidence supporting denial was substantial, and Hartford was not arbitrary and capricious in its decision.

D. Hartford's Consideration of Graham's Disability Retirement

Plaintiff further argoes that Hartford should have given more weight, in reaching its decision, to the Civil Service Administration's detennination that Graham was entitled to disability retirement. Plaintiff cites to the Agency Certification of Reassignment and Accommodation Efforts form, where the individual reviewing Graham's application for disability retirement checked the box that no accommodation was possible because of the severity of the claimant's medical condition. The reviewer further noted that "Ms. Graham has been given a limited duty job, but is unable to perform the duties of this job due to severity of her disabilities. She is currently on LWOP." Admin. Rec. at 355. Hartford argues that the plan administrator is not required to follow an agency's disability

decision because the procedures used to dctclTIIIne disability may differ !i'om tbe procedures under the Policy. While Hartford's denial letter does not specify how the plan administrator weighed the Civil Service Administration determination. it was nonetheless reasonable for Hartford to decide that this evidence was not determinative. The Administrative Record does not include the entire certification form, and the one page that is provided gives no insight into the agency's procedures or which records were reviewed. See id. at 355. Similarly, the letter from the Office of Personnel Management does not explain the basis for the agency's decision. See id. at 557. The Court finds that it was not arbitrary and capricious for the plan administrator to consider Graham's entitlement to disability retirement but ultimately conclude that it was not determinative.

IV.

After reviewing the record, and considering the evidence relied on by Hartford to make its determination, the Court finds that Hartford's decision to terminate LTD benefits was predicated on a reasoned basis and supported by substantial evidence. While there is evidence in the record that would support a disability claim, the question for the Court on review is the reasonableness of Hartford's decision to deny Graham's LTD benefits. The Court finds that Haliford's decision was not arbitrary and capricious, and, therefore, the decision of the plan administrator should be affirmed.

IT IS THEREFORE ORDERED that defendant's July 24, 2008 final decision to deny plaintiffs LTD benefits is hereby affirmed. A separate judgment is filed herewith.

DATED this 13th day of March, 2009.

/s/ Claire V. Eagan
CLAIRE V. EAGAN, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C.A. § 1002 (32)

The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C.A. § 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. § 288 et seq.]. The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of Title 26), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of Title 26), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of

essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)

29 U.S.C.A. § 1132 (a) (1) (B)

(a) Persons empowered to bring a civil action
1 A civil action may be brought–
(1) by a participant or beneficiary–
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C.A. § 1132 (a) (3)

(a) Persons empowered to bring a civil action

A civil action may be brought--

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;